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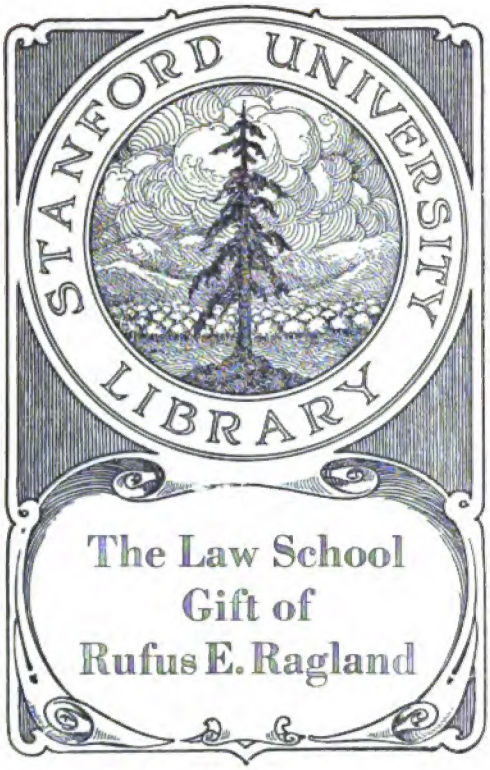
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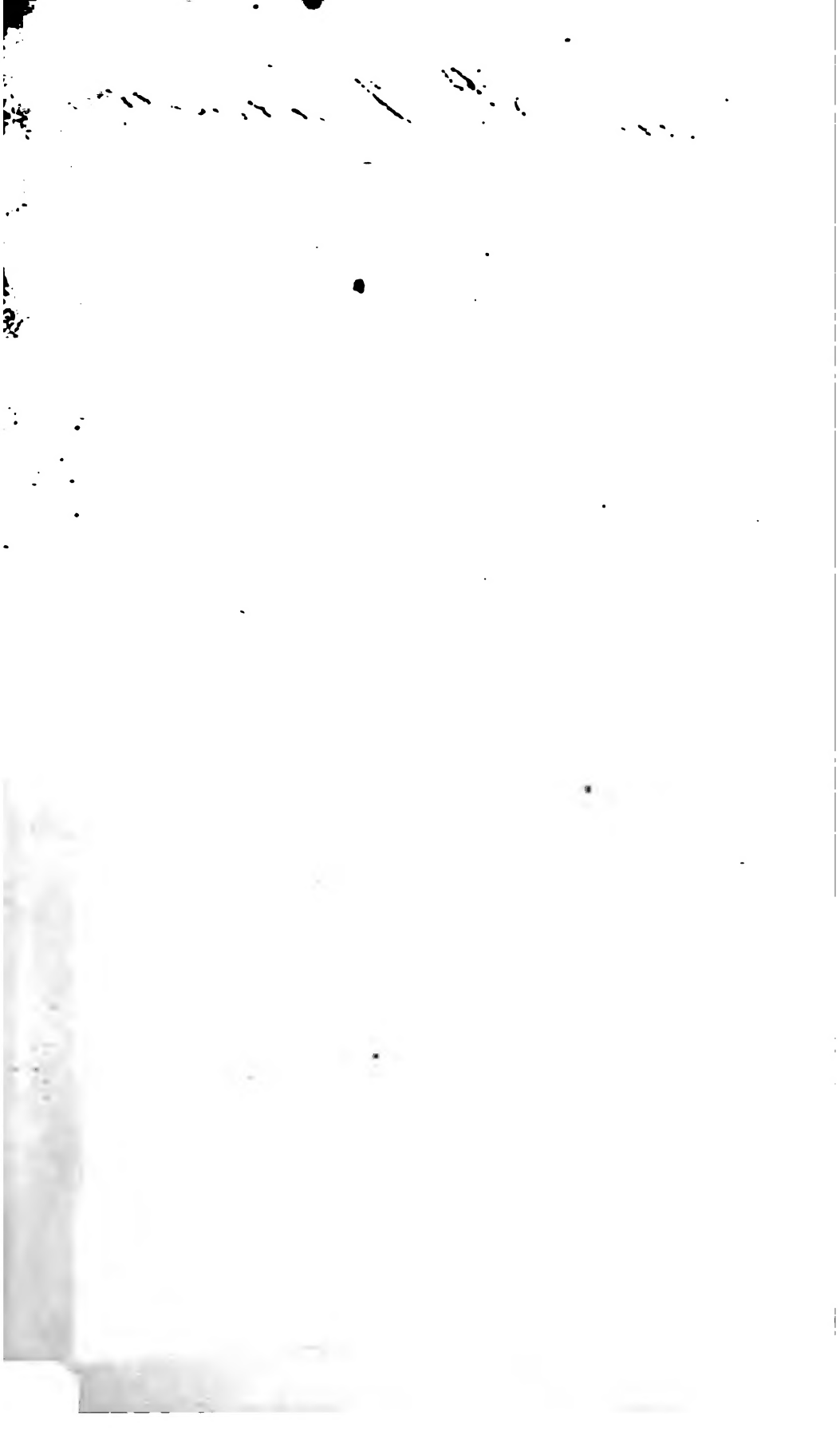

REPORTS

OF

CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR LYNDHURST,

LORD HIGH CHANCELLOR OF ENGLAND.

WITH NOTES AND REFERENCES

TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY JOHN A. DUNLAP,
COUNSELLOR AT LAW.

VOL. V.

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SIR JAMES SCARLETT, Attorney General.

SIR N. C. TINDAL, Solicitor General.

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

A

Agate, Jeudwine v. 283
Antrobus, Cremorne v. 312
Ashley, Stinson v. 4
Attorney General v. Harley, . . . 173
Attwood v. ——— 147
Aubrey v. Hoper 1

B

Bailey v. Lloyd 330
Balstone v. Biron . . . . 237 n
Barber, Simon v. 112
Barnes v. Offer . . . . . 225 n
Bell, Gretham v. 161
Biron, Balstone v. 237n
Bishop, Rufford v. 346
Blackmore v. The Glamorganshire Canal Company 151
Blake v. Gibbs . . . . . 13 n
Bolton, Cook v. 282
Bonner, Plaskett v. 155
Brooke, Popham v. 8
Brummell v. Macpherson . . . 263

C

Catharine Hall, Case of . . . . 85 n
Chauvel, Mutter v. 42
Chissum v. Dewes 29
Clarke, Dew v. 163
Clare Hall, Case of . . . . . 73 n
Cock v. Hobb . . . . . 235 n
Cook v. Bolton 282
Corbet v. Corbet, ... 254
Corbet, Corbet v. 254
Cotton, Stewart v. . . . . 17 n
Cremorne v. Antrobus 312

D

Danby, Palmes v. . . . . 239 n
Dawes v. Scott 33
De Bonneval, De Themmines v. . . 288
De la Rue, Sturz v. 322
De Themmines v. De Bonneval . . 288
Dew v. Clarke 163
Dewes, Chissum v. 29
Drever v. Maudesley 11

F

Farquharson v. Seton 45
Fowler v. Richards 39

G

Gardner v. Rowe 258
Gibbs, Blake v. . . . . 13 n
Glamorganshire Canal Company, Blackmore v. 151
Gonville and Caius College, Case of 76n
Grant v. Grant 189
Grant, Grant v. 189
Green v. Jackson 35
Gregg v. Taylor 19
Gretham v. Bell 161

H

Harley, Attorney General v. . . 173
Haycock, *Ex parte* 154
Hayter v. Trego 113
Higgins v. Mills 287
Hobb, Cock v. . . . . 235 n
Hoper, Aubrey v. 1
Hornby v. Hunter 149
Houston v. Hughes 116

Hughes, Houston v. 116
Hunter, Hornby v. 139

J

Jackson, Green v. 35
Jenkins, *In re* 183
Jeudwine v. Agate 233

L

Lloyd, Bailey v. 330
Lunn, Pruen v. 3

M

Macpherson, Brummell v. 263
Maudesley, Drever v. 11
Mills, Higgins v. 287
Mutter v. Chauvel 42

O

Offer, Barnes v. 225n
Orchard's Case 159

P

Palmes v. Danby 239n
Parry v. Wright 142
Partridge v. Usborne 195
Peyton, *In re* 5
Plaskett v. Bonner 155
Popham v. Brooke 8
Pruen v. Lunn 3

Q

Queen's College, Cambridge . . 64

R

Redmund, *In re* 44
Reynolds, Vaisey v. 12
Richards, Fowler v. 39
Ridgway, *Ex parte* 152
Rowe, Gardner v. 258
Rufford v. Bishop 346
Rule of practice at the rolls . . 23

S

Scott, Dawes v. 32
Seton, Farquharson v. 45
Simon v. Barber 112
Smith, Wigsell v. 299
Steward v. Cotton 17n
Stinson v. Ashley 4
Sturz v. De la Rue 332

T

Taylor, Gregg v. 19
Thellusson v. Woodford . . . 100
Trego, Hayter v. 113
Trevor v. Trevor 24
Trevor, Trevor v. 24

U

Usborne, Partridge v. 195

V

Vaisey v. Reynolds 12

W

Walker, ——— v. 7
Wigsell v. Smith 299
Winter, *Ex parte* 284
Woodford, Thellusson v. 100
Wright, Parry v. 142

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

AUBREY *v.* HOPER.

ROLLS.—1828; May 21, June 16.

Before the new orders, where an order directed that a master should tax costs, in case the parties differed about the same, the party claiming the costs was at liberty to proceed in the first instance to have the costs taxed before the master, without previously delivering a bill to the party required to pay the same, or to his solicitor.

AN order had been made that three of the defendants should pay certain costs, with the usual direction that the master in rotation should tax them, in case the parties differed. The solicitor, who was to receive payment, carried in the bill of costs to the master's office, without previously delivering a copy of it to the adverse parties, or demanding payment from them; and, on the 21st of March, the master signed his certificate.

A petition was now presented, praying that the certificate might be taken off the file for irregularity. The alleged irregularity was, that the bill of costs ought not to have been carried for taxation into the master's office, till a copy of it had been delivered to the parties who were to pay, and an opportunity had been given them of paying without taxation. The order, it was said, plainly meant, that he who was to pay, should have the means of judging whether the charges were reasonable; and it was only if he thought them unreasonable, that the assistance of the master was to be called in.

On the other hand it was asserted, that by the invariable practice, as [*2] it existed before the new orders came into force, the party who was to receive the costs, was at liberty to proceed to taxation without delivering a bill to the adverse party.

Mr. *Koe*, for the petition.

Mr. *Barber*, contra.

THE MASTER OF THE ROLLS desired the parties to obtain the certificate of some of the most experienced clerks in court as to the practice on this point.

Mr. *Barber* afterwards produced the following certificate:—

"We do hereby certify, that, according to the practice of this court, before the operation of the orders of the 3d of April, 1828, where a master was ordered to tax costs in case the parties differed about the same, it was not incumbent upon the party claiming the costs to take a bill of costs to the party required to pay the same, or to his solicitor, but the party claiming the costs was at liberty to take the bill of his costs into the master's office in the first instance, and it was the practice of the master's offices to proceed in the taxation of such a bill as in any other ordinary case, upon warrants being taken out for that purpose.

"Joseph Becknell.
"George Jackson.
"John Baines.
"Richard Mills."

The petition was dismissed.

[*3] *Pruen v. Lunn.

Rolls.—1828; June 12.

It is not necessary to bring a suit of revivor, instituted by the personal representatives of a defendant to a hearing, in order to make the order of revivor effectual against both the plaintiffs and the co-defendants.

The original bill was filed by two executors, for the administration of the real and personal estate of a testator, against another executor, and the persons beneficially interested. After a decree for an account, George Wilcox Osborne, one of the defendants beneficially interested, died; and his executors filed a bill of revivor.

This suit of revivor was now brought to a hearing.

Mr. *Rolfe*, for some of the defendants, objected that, as a common order of revivor might have been obtained, such a suit ought not to have been brought to a hearing.

Mr. *Roupell* insisted, that the common order, though it might have revived the suit as against the plaintiff, would not have revived it against the co-defendants, and that it was therefore necessary to bring the suit of revivor to a hearing.

The Master of the Rolls was of opinion, that the suit ought not to have been set down and brought to a hearing, and that the plaintiffs in the bill of revivor ought to pay the costs occasioned by their course of proceeding.

The defendants ultimately waived their right to costs.[1]

[1] As to entituling papers where there is an original and revived suit, see *Jones* v. *Smith*, 2 Yo. & Coll. C. C. 42.

*STINSON *v.* ASHLEY. [*4]

ROLLS.—1828; June 12.

A decree may be made by consent in a cause, relating to the separate property of a married woman, in which she and her husband are co-plaintiffs.

A MARRIED woman, to whom an annuity was bequeathed for her separate use, joined with her husband in assigning part of it for valuable consideration: and she, the husband, and the purchaser, afterwards filed a bill against the executors of the testator, under whose will the annuity was claimed.

The cause was heard by consent, and a decree made; but the decree had not been drawn up, in consequence of a doubt entertained by the registrars, whether a decree could be made by consent in a cause relating to the separate property of a married woman, where she and her husband were co-plaintiffs.

Mr. *Knight*, having stated the doubt to the court, requested that the decree might be ordered to be drawn up.

THE MASTER OF THE ROLLS was of opinion, that such a cause might be heard by consent, and ordered the decree to be drawn up.[1]

---

*IN RE PEYTON [*5]

ROLLS.—1828; June 19.

Where money is to be invested in the purchase of land, there the court can make no other order, under the 7 G. 4, c. 45, than that, subject to the antecedent uses, the estate shall be settled to the use of such person or persons who would have been entitled to the estate tail, his, her, or their heirs and assigns.

A PETITION was presented by Sir Henry Peyton, Bart. and Henry Peyton, Esq. his son, praying a reference to the master to inquire whether Henry Peyton the son was entitled to a sum of 15,000*l.* as tenant in tail, under the 7 G. 4, c. 45. The master made his report, stating, that, upon the marriage of Sir Henry Peyton and his wife, who was the mother of the other petitioner, and was then living, certain estates of Sir H. Peyton were settled to the use of Sir Henry Peyton for life; with remainder to trustees to preserve contingent remainders; with remainder to the intent that Lady Peyton might have a jointure of 1000*l.* a year; with remainder to trustees for a term of 200 years for securing the same; with remainder to certain other trustees for a term of 500 years, for securing portions to the younger children of the marriage; with remainder to the first son of Sir Henry Peyton by his said wife, and the heirs male of the body of such son, with divers remainders over. The master further found, that the sum of 15,000*l.* had been raised by sale of part of

[1] Whether the husband and wife were properly joined as plaintiffs in the above case, see 1 Keen 9, n. 1.

the estates comprised in the said settlement, pursuant to a power therein contained, and, by the terms of the settlement was to be re-invested in other lands to be settled to the same uses; and that the petitioner Sir Henry Peyton, and the other petitioner Henry Peyton, Esq., as tenant in tail in remainder, were entitled to the sum of 15,000*l.*, subject to the uses of the said settlement, which were antecedent to the estate tail.

A further petition was then presented to confirm the master's report, [*6] which prayed that it might be declared, *that the estate tail of the petitioner Henry Peyton, and all remainders and reversions expectant thereon, were absolutely barred, and that the hereditaments to be purchased with the 15,000*l.* might be settled, subject to the uses of the said settlement antecedent to the said estate tail, to the uses of such person and persons, and for such estate and estates as the petitioners should jointly appoint; and for want of such appointment, to the use of the petitioner Henry Peyton, and the heirs male of his body; and for default of such issue, to the use of the petitioner Sir Henry Peyton, his heirs and assigns for ever.

THE MASTER OF THE ROLLS:—Stated that the 7 G. 4, had given no authority to the court to make such an order: that where, under the act, the money was to be paid, the court was expressly authorized to direct such payment to be made in such manner, and for such purposes as the petitioners should appoint, and the court should approve; but that, where the money was to be invested in the purchase of other estates, there the direction of the act was, that, subject to the antecedent uses, they were to be settled to the use of such person or persons who would have been entitled to the estate tail, his or their heirs, and assigns; and that he would make no other order in the present case.

THE MASTER OF THE ROLLS added, that the intention of the legislature in the difference between the two provisions probably was, to check any bargaining between the tenant for life and the tenant in tail in remainder, by rendering a subsequent instrument necessary to give it effect: a check which could not be applied where the money was to be paid.

[*7] *—— *v.* WALKER.

ROLLS.—1828; June 19.

Where a testator authorizes his three executors to lend money on personal security, it is a breach of trust, if two of the executors lend it to the third.

BY the will of the testator in this case, the three executors were directed to invest a sum of 400*l.*, either on the security of a double bond, or on mortgage security, and to pay the interest to the plaintiff for life, with remainder, after her decease, to her children. The defendant Walker, one of the three

executors, was, at the death of the testator, indebted to him in a larger sum than 400*l.*; and subsequently he paid 400*l.*, part of this debt, by advancing it to William Crispe, one of the other executors, upon the security of the bond of William Crispe and his brother John Crispe. The defendant Walker, and the third executor since deceased, were named the obligees in the bond.

It was proved in the cause, that William Crispe, at the time when the money was lent to him, was in good credit, although he afterwards absconded and went to America, and his brother became a bankrupt.

The defendant Walker, proved the bond under the commission of the brother, and received dividends to the amount of 105*l.*

The bill was filed for the purpose of compelling the defendant Walker and the personal representatives of the third executor to make good the difference between the 165*l.* and 400*l.*

THE MASTER OF THE ROLLS:—When a testator empowers three executors to lend money on personal security, he must be taken to rely *upon [*8] the united vigilance of the three with respect to the solvency of the borrower. If two of the three lend it to the third, this object is defeated, and it is a breach of trust. The defendant Walker is therefore clearly liable to make good the deficiency: but with respect to the third executor, there must be an inquiry whether he was privy and consenting to the loan of money by Walker to Crispe.

POPHAM *v.* BROOKE.

ROLLS.—1828; June 23; July 1.

A patient executed instruments, whereby he secured to the defendant, his surgeon, an annuity of 100*l.* during the life of the defendant, in consideration that the defendant would live with him and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the defendant called in an eminent physician to visit the patient, who stated to the defendant his opinion that the patient could not recover nor live long; and, about the same time, the defendant expressed to a witness in the cause, that the patient could not live more than a month or six weeks.—These instruments cannot be maintained, even if the patient were of sound mind and capable of business.

THIS was a bill by the executrix of the late Colonel Popham against the defendant Brooke, praying to have a deed and bond, by which Colonel Popham had secured to the defendant an annuity of 100*l.* for the term of his, the defendant's life, delivered up to be cancelled.

Colonel Popham, having had an apoplectic attack in India, returned to this country for the benefit of his health in a ship belonging to the East India Company, of which the defendant was surgeon; and, during the voyage, in the course of which he had another apoplectic attack, he enjoyed the benefit of the defendant's professional assistance. The ship arrived at Gravesend on the 5th of July, 1824, and the defendant attended Colonel Popham to London,

where they arrived on the 7th of July, and resided together at an hotel.

[*9] On the 8th of July, Dr. Nevinson was sent for by the defendant *to give his opinion on Colonel Popham's case. Being examined as a witness in the cause, Dr. Nevinson stated, that he found Colonel Popham incapable of business, uttering monosyllables only, and that, too, with difficulty, and laboring under a diseased organization of the brain. Dr. Nevinson, on that occasion, informed the defendant, that the colonel could not recover or live long.

Either on the same 8th of July, or on the day preceding, the widow of General Popham, the uncle of the colonel, and by whom he had been brought up, called at the hotel to see Colonel Popham; and, being examined as a witness, she stated in her evidence, that she there saw the defendant, who informed her, that the colonel was in a deplorable state and not fit to see his relations, and that, in the opinion of the defendant, the colonel could not live more than a month or six weeks: that she inquired of the defendant, whether Colonel Popham had received a note which she had written to him the day before; that the defendant answered, that he, the defendant, had received the note, but had not communicated it to the colonel, because he was incapable of understanding, of reading, or of writing.

On the 12th of July, the deed and bond in question were executed by Colonel Popham, whereby, in consideration that the defendant would remain with the colonel during the remainder of his life as his medical assistant, the colonel secured to the defendant an annuity of 100*l.* for the life of the defendant.

Colonel Popham and the defendant remained at the hotel in London, until the end of August, and then went together to the house of an aunt of Colonel Popham's in the country, where Colonel Popham died in the following October.

[*10] *The attorney, who drew the deed, and who, till then, was a stranger to Brooke, deposed, that Colonel Popham perfectly understood the nature of the instruments, before he executed them, and was capable of business at the time.

Several relations of Colonel Popham, who saw him in the country, gave evidence as to the care and attention with which the colonel was attended by the defendant, and that, in their judgment, Colonel Popham was capable of understanding the effect of the instruments.

On the part of the defendant, the case was rested on the capacity of Colonel Popham, and on the sacrifice which the defendant had made in giving up his situation as surgeon to the East India ship for the purpose of fulfilling his part of the contract.

Mr. *Horne* and Mr. *Abbot*, for the plaintiff.

Mr. *Bickersteth* and Mr. *Spence*, for the defendant.

July 1.—THE MASTER OF THE ROLLS:—If it were admitted that Colonel Popham was of capacity to understand, and did perfectly understand the na-

ture and effect of these instruments, they could not be maintained by the defendant. On the 8th of July the defendant was informed by Dr. Nevinson that Colonel Popham could not recover, nor survive long; and, either on that or on the preceding day, the defendant stated to Mrs. Popham his own opinion that Colonel Popham could not live more than a month or six weeks. When, therefore, these instruments were executed on the 12th of July, the defendant well knew that he was, in fact, giving little or no consideration for so large a gratuity; whereas Colonel Popham must have executed *them in the hope of a prolonged life. Under such circumstances, it [*11] would have been the bounden duty of the defendant to have declined a compensation of that character, even if Colonel Popham had pressed it upon him, and had been, in truth, capable of business. If, however, the capacity of Colonel Popham on the 12th of July, when the deeds were executed, had been a material ingredient in the case, is it possible that such capacity could be assumed, consistently with the evidence of Dr. Nevinson and Mrs. Popham, which applies to the 8th of July?

The plaintiff is entitled to a decree according to the prayer of the bill, with costs.[1]

[1] An agreement obtained by a surgeon from a deceased patient then in his eighty-sixth year, for the payment, in consideration of past and future services, of 25,000*l.* in six months after the death o the deceased, was set aside upon the ground that the court was satisfied that the patient never did agree to, or intend to direct what in the alleged agreement he was represented as agreeing to and directing, and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it. Lord Cottenham, in pronouncing his decision, observes: "It was argued, upon the authority of the civil law and some adjudged cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are; but I will not narrow the rule, or run the risk of, in any degree, fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely exercised. And when I find an agreement, so extravagant in its provisions, secretly obtained by a medical attendant from his patient of a very advanced age, and carefully concealed from his professional advisers and all other persons, and have it proved that the habits, views, and intentions of the testator were wholly inconsistent with those provisions, I cannot but come to the conclusion that the medical attendant did obtain it by some dominion exercised over his patient. How it was effected, whether by direct fraud, or by what other means, the defendant has by the secrecy of the transaction, prevented my having any direct testimony. By that he cannot profit, the conclusion being, I think, satisfactorily established. It was, indeed, argued that the relation of medical attendant and patient had ceased, before the date of the agreement, by that very notice to discontinue his visits, to which I have before adverted. The relation does not cease because the patient has not medicine actually administered to him at the time, any more than the relation of attorney and client ceases because no suit may be actually in progress. If it were otherwise, I do not know that it would have made any difference, &c." *Dent* v. *Bennet*, 4 Myl. & Cr. 269. S. C. 7 Sim. 539. In a late case, *Gibson* v. *Russell*, (Feb. 1843,) 2 Yo. & Col. C. C. 104, a deed of gift of real estate of about the value of 1000*l.* from an infirm person of the age of eighty, whose sanity was questionable, and who afterwards committed suicide, to his intimate friend and medical attendant was set aside. The facts of the case are highly interesting, but the circumstances are too numerous and minute to admit the introduction in this place, of even an abridged statement of them. Still, one cannot avoid admiring the lenity with which the Vice-Chancellor, (Sir J. L. Knight Bruce,) comments on the conduct of the defendant, and the singular disposition he made of the costs

DREVER *v.* MAUDESLEY.

ROLLS.—1828; June 26.

A foreigner, who claimed to be a creditor of the testator in the cause, petitioned to have his claim referred to the master, after he had made his report: the court made the order, upon condition of his giving security for the costs.

A FOREIGNER, who claimed to be a creditor of the estate of the testator, which was administered in this suit, and who had omitted to bring in his claim, before the master had made his report, now petitioned to have his claim referred to the master. The petition described him as resident in Paris.

Mr. *Roupell* and Mr. *Tinney* objected, that, as the party was not within the jurisdiction, he ought to give security for costs.

Mr. *Pemberton*, contra:—The court made the order, upon his giving security for costs.[1]

[*12] *VAISEY *v.* REYNOLDS.

ROLLS.—1828; July 2.

Where a testator gives to one person "all his moneys in hand;" and to another "all his moneys out on securities; the balance at his bankers will pass as money in hand.

A gift of "all farming stock" will not, as against the devisee, pass crops on the ground, unless there be a plain intention that the legatee of the farming stock is to take all the personal estate.

THE testator, James Reynolds, *inter alia*, made his will in the following words:—"I give to my wife all and every my household goods, furniture, plate, linen, china, and household effects whatsoever; and also all and every my book debts, *moneys in hand*, stock in trade in my dwelling house, shop, and malting; and also *my farming stock* of every kind and description whatsover. I give and bequeath to my executrix and executor hereinafter named all and every my moneys out at interest on mortgage, notes of hand, or any

of the cause. In a previous case, *Consett* v. *Bell*, 1 Yo. & Coll. C. C. 569, 78, in which the same Vice-Chancellor refused to give effect to a conveyance from a deceased person to his bailiff and confidential agent, he says: "That it [the conveyance] was voluntary is not all: exhibiting no trace of good advice, marked with a strong character of improvidence, it was obtained by a confidential agent from his principal, for the benefit of the agent himself, who is now asking a court of equity to support it, or to stand neutral concerning it, in the total absence of any evidence to show under what, or whose instructions, or under what circumstances, or with what degeee of explanation, information or knowledge, it was prepared and executed. I say with Lord Eldon and Lord Cottenham, that a man who engages in a transaction such as this, takes upon himself the burthen and obligation of clearly proving that it is fair and righteous."

[1] Where a client, resident abroad, applies for the taxation of his solicitor's bill of costs, on undertaking to pay, he must give security for the costs of the proceeding, unless it appears that the solicitor has in his hands sufficient security for them. *In re Pasmore*, 1 Beav. 94.- See, further as to security for costs, *Bailey* v. *Gundry*, 1 Keen, 55, 57, and note, Am. ed.

other security whatsoever, together with all my moneys vested in the public funds, and all the rest, residue, and remainder of my personal estate and effects and property of every kind and description whatsoever and wheresoever, not by me otherwise disposed of."

The testator, at the time of his death, had money in his banker's hands, which was afterwards paid with interest. The banker's habit was to pay three per cent. to his customers on all moneys which remained in his hands for nine months; but all such moneys were in the same order and disposition of the customers, as if no such interest had been allowed.

One question was, whether that money passed to the wife, or was included in the residuary bequest?

The testator, at the time of his death, occupied a farm, on which there were growing crops.

*A second question was, whether the crops on the ground passed to [*13] the wife under the bequest of "all his farming stock?"

Mr. *Sidebottom*, for the wife.

Mr. *Blackburn*, for the residuary legatee.

Mr. *Garratt*, for the executors.

On the first question, *Carr* v. *Carr*(*a*) was cited.

For the wife, on the second point, were cited *Cox* v. *Codsalve*(*b*) and *West* v. *Moore*.(*c*)[*]

(*a*) 1 Mer. 541, note. (*b*) 6 East, 604, note. (*c*) 8 East, 339.

[*] Blake v. Gibbs.

1825; February 22.

A tenant for life of a plantation in Jamaica bequeathes and devises to A., his heirs, executors, administrators, and assigns, all her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses, and other live and dead stock upon the plantation, and all other her real estate in Jamaica; and, after various specific and pecuniary legacies, she gives the residue of her goods, chattels, and personal estate and effects to B; A. is entitled to the growing crops, which were on the plantation at the death of the testatrix.

Margaret Plunkett, by her will, dated the 5th of August, 1812, devised unto George Gibbs the elder, and his son George Gibbs the younger, "all and every her negro, mulatto, and other slaves, men women, and children, and all her cattle, mules, horses, asses, and other live and dead stock upon a certain plantation or estate called Lloydds, or the lands thereto belonging, situate in the parish of St. John in the island of Jamaica, or wheresoever else the same slaves, cattle, and stock, or any of them were or should be at the time of her decease, and all the issue, offspring, and increase of the females of the said slaves, and on or from which the said plantation or estate called Lloydds, and such of the negro slaves, cattle, and stock as were thereon at the time of the death of her late creditor Mathew Plunkett deceased, there was a large debt due to her on mortgage, and of which said plantation or estate called Lloydds she was tenant for life under and by virtue of the will of her said late creditor, and all other her real estate in the said island of Jamaica, and all her right, title, and interest in and to the said slaves, cattle, mules, and other live and dead stock, and other real estate in the said island of Jamaica, to hold the same several slaves and their issue, offspring, and increase, and the said cattle, mules, and other live and dead stock, and all other her said real estate in Jamaica unto and to the use of the said George Gibbs the elder, and George Gibbs the younger, their heirs, executors, admin-

[*14] *THE MASTER OF THE ROLLS:—The testator has referred to two descriptions of moneys—moneys in hand—and moneys out at interest

istrators, and assigns," upon certain trusts. Then, after various specific and pecuniary legacies, she disposed of the residue of her estate by the following words:—"As to all the rest, residue and remainder of my moneys, and securities for moneys, government stocks, and funds, household goods and furniture, jewels, rings, and trinkets, and all other my goods, chattels and personal estate and effects whatsoever and wheresoever, and of every nature, kind, sort, and denomination soever not by me hereinbefore otherwise disposed of, subject to the payment of my just debts and funeral expenses, and the charges of proving this my will, and also subject to the said several legacies by me in and by this my will given and bequeathed as hereinbefore mentioned—I give and bequeath the same residuary estate and effects, and every part and parcel thereof unto my cousin Maurice Blake, his executors, administrators, and assigns, to and for his and their own proper use, benefit, and disposal, and as to and for his and their own proper goods, chattels, moneys, estate, and effects absolutely for ever."

The testatrix died in April, 1814.

George Gibbs the elder and George Gibbs the younger proved the will: and as the testatrix was only tenant for life of the plantation, they caused proceedings to be taken according to the laws of the island of Jamaica, for having the value of the emblements or growing crops at the time of her death, duly ascertained; and they received, in respect of those emblements, upwards of 1760*l.* from the person entitled to the plantation in remainder or reversion.

The testatrix had also household goods and other articles of furniture, which were in the dwelling-house on the plantation.

Blake, the residuary legatee, claimed by his bill to be entitled to the household goods and furniture, and to the growing crops, as a part of the general residue.

The defendants, who were beneficially interested under the devise and bequest to the two Gibbses, submitted, that the emblements passed by the words "other live and dead stock on the plantation."

Mr. *Shadwell* and Mr. *Sanders*, for the plaintiff:—"Live and dead stock" are not words, which, in their natural import, include growing crops; and when connected by the word "other" with the articles previously enumerated, they must be considered to denote things *ejusdem generis*.

Mr. *Sugden* and Mr. *Lynch*, for the defendants beneficially interested under the bequest to the two Gibbses:—*Cox* v. *Godsalve*, (*a*) and *West* v. *Moore*, (*b*) prove that a bequest of "the stock on a farm" will pass the growing crops. In *Steward* v. *Cotton*, (*c*) which was heard in 1777 before Mr. Justice Willes, and Masters Holford, Browning, and Orde, a testator devised a farm to his wife for life, remainder to A. in fee, together with all the stock which should be upon the farm at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm. A. having died, the testator, by a codicil, gave the estate and the stock thereon, after his wife's decease, to B. The wife severed corn, which was growing at her husband's death, and stacked it on the premises, and died shortly afterwards: and it was decreed that her personal representative was entitled against the remainder to an account of the growing crops thus severed. That decree implied that the term "stock" passed the growing crops. "Other live and dead stock" must include every species of stock, and is not to be confined to stock of any particular kind. The word "other" applies only to live stock, and not to dead stock, for all the articles specifically enumerated belong to the class of live stock.

Mr. *Shadwell* in reply:—The present case is distinguishable from the cases cited in two respects. First, the language is different. The words "other live and dead stock," preceded by an enumeration of specific articles, are not so extensive in their import, as a simple bequest of all a man's stock. Secondly, in the cases cited, the contest was with the devisee of the land; and as emblements are part of the personal estate, the presumption will be in favor of a legatee, who claims them as personal estate, rather than of a devisee of the land. Here the question is between a specific legatee and a residuary legatee.

(*a*) East, 604. (*b*) 8 East, 339.

(*c*) Reg. Lib. B. 1777, fo. 558. See *infra*, the case stated from the registrar's book.

on mortgage, notes of hand, and other securities whatsoever. The balance in the banker's hands, though it carried *interest, was not out [*15] at interest on security; and it was in the same order and disposition of the testator, as if it had been deposited in his own drawer. It must be inferred that the testator meant to pass it by one of the two *de- [*16]

Lord Gifford, Master of the Rolls:—The two cases, which have been cited, prove that the emblements are part of the stock, and will pass under the description of stock on a farm; and I cannot help thinking that the claim of the specific legatee is stronger here than in either of those cases, from the circumstance of the testatrix having been only tenant for life. When she gives the other live and dead stock on the plantation, her evident intention is to give every thing connected with the plantation, and particularly all the stock. As to live stock, she had before enumerated almost every species of live stock, including slaves and cattle. Her evident intention being to pass all the stock on the farm, I must declare the defendants entitled to the emblements.

The household goods and furniture belong to the plaintiff.

Steward v. Cotton.

Coram Willis, Justice, and Masters, Holford, Browning, and Orde.

1777; May 12.

A testator devises a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm; and he bequeathed the residue of his estate and effects, real and personal, to his wife absolutely.

The testator died in July; the wife having severed the growing crops, and stacked them on the farm, died in the following September, when the remainder-man entered and took possession both of the farm and of the crops which had been so severed: held that the personal representative of the wife was entitled to those crops.

A testator devised a certain farm in Folding to his wife Elizabeth Willshaw for life, remainder to A. in fee, together with all the stock which should be on the farm at the time of his decease, which, it was his will, should be kept up by his wife during her life, and go along with the farm: and he bequeathed all the residue of his estate and effects real and personal, after payment of his debts and legacies, to his wife, her heirs, executors, administrators, and assigns.

A. having died, the testator, by a codicil reciting his death, gave the farm and the stock thereon, after the decease of his wife Elizabeth Willshaw, to Nathaniel Cotton. By the same codicil he bequeathed his household goods, plate, and linen in his house at Marlow to his executor Barnidiston, in trust to permit his wife to have the use thereof during her life, and, after her decease, upon trust for Cotton absolutely.

The testator died on the 4th of July, 1771. The widow entered into possession of the farm, and severed the growing crops, and housed or stacked them on the farm.

On the 29th of September, 1771, she died: and, on the following day, Cotton entered upon the farm, and took possession of the corn and grain which had been severed by the widow.

The bill was filed by the personal representative of the widow, and prayed an account of the crops so cut and severed.

Cotton insisted by his answer, "that the crops of grain and other things severed from the premises by the widow Elizabeth Willshaw, were, by virtue of the codicil, the property of him the defendant.

The decree was as follows:—"The court doth declare, that the plaintiff, as the personal representative of Elizabeth Willshaw, the testator's widow, is entitled to all the stock of corn and grain on the farm called Folding, from the time they were cut and severed by the said Elizabeth Willshaw; and this court doth order that it be referred to the master, &c., to take an account of the corn and grain so cut down and severed, and of the money produced by the sale thereof, come to the hands of the defendant, Nathaniel Cotton, or of any person, &c., and that what shall be found due on such account be paid by the defendant to the plaintiff."

Reg. Lib. 1777, B. 568.

scriptions which he has used. In no sense was it money on security; and, in a reasonable sense, it was money in hand, and passed, therefore, to the wife.[1]

[*17] *On the second question it is to be observed, that, in the case of *Cox* v. *Godsalve*, where the words of the gift to the executor were "stock of my farms," there were other words in the gift which com-

[*18] prised all personal *estate. And in *West* v. *Moore*, where the words of the gift to the executor were, "stock upon my farm," the whole personal estate of every nature and kind was, in terms, comprised in the gift. These cases were between the executor and the devisee of the land; and the rule is, that, although crops on the ground are personal estate, and generally speaking, pass to the executor, yet, as between the executor and the

[*19] devisee, the devisee will *take them with the land, unless the intention of the testator appears to be otherwise. In these two cases such intention seems to have been inferred, rather because the executor was plainly meant to take the whole personal estate, than from the mere force of the words "stock of my farm," or "stock upon my farm." In the present case, the gift in question to the wife comprises only some parts of the personal estate, and "all my farming stock," in common and popular language, does not include crops on the ground; and the wife, therefore, is not entitled to them.[2]

Gregg *v.* Taylor.(*a*)

Rolls.—1828; July 4.

Where the wife is one of several persons claiming to be entitled, as next of kin, to share in residuary property, which is under the administration of a court of equity, the husband is not a competent witness, upon an issue, to prove her consanguinity to the testator.

This was a motion for a new trial, directed by the Master of the Rolls for the opinion of a jury, whether certain persons named as plaintiffs, together with one Mary Freemantle, were second cousins, once removed, of the deceased Mr. Osgoode. Mary Freemantle had at first been included as a plaintiff; but, it being considered that her husband was a material witness, an application was made to the Master of the Rolls to omit her name as a plaintiff, in order to avoid the formal objection to the husband's testimony, which would arise from that circumstance: and the Master of the Rolls acceded to that ap-

(*a*) Vide 4 Russell, 279.

[1] Vide *Rogers* v. *Thomas*, 2 Keen, 8, 13, and note ibid. *Dowson* v. *Gaskoin*, id. 14, 18, and note ibid.

[2] Crops growing at the time of the testator's death do not pass under the word "appurtenances." *Shelton* v. *Shelton*, 1 Wash. 53.

plication, expressly stating that he made the order without prejudice to any legal objection to the testimony of William Freemantle, the husband.

The bill was filed for the administration of the property of the testator; and the question to be tried in the issue arose in consequence of [*20] the death of the residuary legatee nine days before the death of the testator. Prior to the trial of the issue, William, the husband of Mary Freemantle, assigned all his interest in the property of the testator to his grand children, and, at the trial, he executed a release to the executors of the testator.

The issue came on to be tried at Winchester at the last spring assizes, by a special jury, before Mr. Justice Littledale. A verdict was found in favor of the plaintiffs; and the learned judge reported that he was not dissatisfied with the verdict.

A new trial was now moved for upon two grounds: first, because the learned judge had admitted William Freemantle as a witness; secondly, because, even if he were a good witness, the verdict was against the weight of evidence.

Mr. *Selwyn*, Mr. *Jeremy*, and Mr. *Cooper*, for the motion.

Mr. *F. Williams*, Mr. Serjeant *Merewether*, Mr. *Lovat*, and Mr. *Manning*, contra:—In support of the first ground, the case of *Davis* v. *Dinwoody*(*a*) was cited. The purpose, it was argued, for which the evidence of the husband had been tendered, was, to prove that his wife was entitled to a share of the residuary fund; and his release and assignment, though they might annihilate her legal right, could not affect that equitable interest which this court acknowledged and protected. The residuary fund was to be ad- [*21] ministered in this suit; and Mrs. Freemantle's right to a settlement out of her share (if she should be entitled to any share) would be enforced against her husband and all who claimed under any instrument which he might execute. Her equity, arising out of the acknowledged law of the court, was as substantial an interest, as if it had been created by a conveyance to her separate use. It had been decided in *Davis* v. *Dinwoody*, that the evidence of the husband could not be received, where the latter species of interest was in question; and the same rule must apply to the former.

On the other hand, it was insisted, that there was no resemblance between the wife's equitable right to a settlement, and the interest which a married woman took under a conveyance to her separate use. The former, in fact, could not be considered an interest; it was annihilated by a mere form of words, without the execution of any instrument or conveyance. Courts of equity had acquired the habit of refusing to lend their aid to give the husband possession of the wife's fund, unless a provision were made for her and her children, or the right to such a provision were waived by her consent in

(*a*) 4 T. R. 678.

court; and, unquestionably, they had full authority to prescribe the terms on which alone they would consent to interfere. But their refusal to lend their aid, though advantageous to the wife, was very different from the existence of a positive interest in her.

THE MASTER OF THE ROLLS:—It is a settled rule of law, proceeding upon sound policy, that husband and wife cannot be witnesses for or against each other: and the case of *Davis* v. *Dinwoody* has decided—what, indeed, was clear in principle—that it makes no difference, whether the interest [*22] of the husband or wife, to be affected by the testimony, is legal *or equitable. The case of *Davis* v. *Dinwoody* had this circumstance,—that the husband's testimony, in support of the wife's interest, was directly opposed to his own interest, and would have fixed him personally with the debt, which otherwise would have been satisfied with his wife's property. But the rule was still held to apply. In the present case, this court, having taken upon itself the administration of that property, to a part of which Mary Freemantle claims to be entitled as one of the second cousins, once removed, of the testator William Osgoode, she has a clear equitable interest, unaffected by the assignment and release of her husband, and of which she can be deprived only by her own consent in open court, or by commission, after the amount is ascertained. In support of that interest the husband was not a competent witness, and his evidence must be rejected.

Rejecting his evidence, there remains no testimony by which the precise degree of consanguinity between the claimants and the testator can be ascertained, unless it be assumed, that, when the will of the testator's father speaks of his cousins, Richard Osgoode of Woodman's Green, and William Osgoode of Hartley Wood, it must be intended that he means to describe them as first cousins. I can find nothing in the context of the will to afford that inference; and the term *cousin*, in common and popular language, is of too extensive a signification to be so limited, without an explanatory context. The parties must, therefore, proceed to a new trial of this issue.

[*23] *RULE OF PRACTICE.

ROLLS.—1828; July 7.

Rule of practice at the rolls—that, in future, not more than two counsel shall be heard in support of a motion for the new trial of an issue, nor more than the same number in opposition.

AT the sitting of the court, the MASTER OF THE ROLLS stated, that the attention of the Lord Chancellor and the other judges of the court had lately been called to the subject of motions for the new trial of issues directed by the court; that it appeared to have become a practice on such motions, to em-

ploy four or five counsel on each side; that such a practice was a great grievance to the parties in point of expense; that it must be admitted, that it tended to occupy more of the time of the court than the interest of the parties required; that, upon these considerations, the Lord Chancellor and the other judges concurred in opinion, that it would be fit in future, that not more than two counsel should be employed in support of a motion for a new trial, and not more than the same number in opposition to it; and that he, the Master of the Rolls, had authority to declare, that such was henceforward to be the rule of practice in each branch of the court.

On several occasions, since this rule was promulgated, more than two counsel have been heard, in the Lord Chancellor's court, in support of and against a motion for the new trial of an issue.

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*Trevor *v.* Trevor. [*24]

Rolls.—1828; July 7, 21.

A testator gives to his wife an annuity of 100*l.* and the sum of 1000*l.*, which he considers will, with the property which she is entitled to after his death, make up to her an income of 2500*l.* a year; in fact, those gifts make up her income only to 1800*l.* a year; she is entitled to have the deficiency supplied out of his residuary estate.

John Viscount Hampden made his will, *inter alia*, in the following words:—"I give and bequeath to my dear wife, Harriet Lady Hampden, the remaining term in my house in Berkeley Square, and the stables and offices thereto, together with all furniture, useful and ornamental, usually contained in my said house, whether linen, china, glass, wines, or other effects, not otherwise hereafter disposed of, and also with all such English, French, and Italian books as she shall choose, and all my pictures and framed drawings, together with all my carriages, coach and saddle horses, harnesses, and things thereunto belonging, and all such silver plate as belonged to either Dr. or Mrs. Burton, and my silver tea-urn, and tea and coffee-pots, spoons, knives and forks, sugar-tongs, four flat and two pair of such high candlesticks, as she shall choose, except the large pair, on which, by mistake, my arms with supporters are engraved, a silver bread-basket, two of the smaller waiters, cruet, and salt-cellars, and all my plated articles; together with all jewels, watches, and trinkets not otherwise hereafter disposed of. And I further give and bequeath to my said dear wife an annuity of 100*l.* during her life, and the sum of 1000*l.* to be paid to her within thirty days after my decease. And I hereby express my conception and belief, that, together with the above bequests, the landed property, to which by our marriage settlement she will succeed upon my death, the money standing in her name in the funds (which, or so much thereof as may be necessary for making up to her an annual income of 2500*l.*,

as hereafter mentioned, I hereby give and bequeath to her,) and with [*25] her jointure, which *is in the funds in trustees' names, will produce to her an income of more than 2500*l.*, which, I know, will most amply supply all her very moderate wants and wishes, or I would give her more."

On the hearing of the cause, it was referred to the master to inquire, what was the annual amount of the landed property to which Lady Hampden was entitled by her marriage settlement, of the money standing in her name in the funds, and of her jointure which was in the funds. The master having reported that the annual amount of these properties, adding to it the annuity of 100*l.*, and the interest of 1000*l.* given by the will, would not exceed altogether 1800*l.*, two questions were raised: First, whether Lady Hampden was entitled to have her income made up 2500*l.* per annum out of the testator's residuary estate; and, secondly, whether the annual value of the house in Berkeley Square was to be computed as part of that income. This house was held by the testator on a lease, of which, at his death, about fourteen years were unexpired.

Mr. *Pemberton*, for Lady Hampden:—The purpose of the testator was, to insure to his wife an income of 2500*l.* a year: for he expresses his belief, that his bequests, together with certain other property, will yield her that sum annually; and he declares, that his only reason for not raising her income above 2500*l.* year is, that he knows her wants to be so moderate that she will not require more. It happens, however, that he has made an erroneous estimate of the annual value of some portion of the property which Lady Hampden takes: so that there is a deficiency of about 700*l.* a year. But where the intention to give benefits of a certain amount is clear, the court does not permit the legatee to be disappointed by the erroneous estimate of the [*26] *testator. *Milner* v. *Milner*,(*a*) *Whitfield* v. *Clements*.(*b*) In a late case of *Pickford* v. *Randall* before the Vice-Chancellor, a father, by his will, reciting that his son owed him 16,000*l.*, bequeathed to him 5500*l.* of the debt, and directed the residue of the debt to be paid by instalments. The son alleged, that he was indebted to his father only in 11,000*l.*, and that, the intention of the testator being to give him a benefit of 5500*l.*, he was entitled to retain the full amount of that sum from the 11,000*l.* It was referred to the master to inquire, whether the testator had fallen into the alleged mistake.

The annual value of the house in Berkeley Square cannot be included as part of the income of 2500*l.* The house was for the personal occupation and enjoyment of Lady Hampden, and was not meant to be converted into a source of pecuniary benefit. The gift of it occurs among a great number of specific bequests of various articles, which could not possibly be regarded as yielding income: and as there was a probability that the term would expire in Lady Hampden's lifetime, it was the less likely that its annual value

(*a*) 1 Ves. sen. 106. (*b*) 1 Mer. 402.

should be considered as a portion of the permanent income which was to be secured to her.

Mr. *Barber*, for the plaintiff:—In *Milner* v. *Milner*, the testator declared in express words, that he designed 10,000*l.* for his daughter's fortune, and the court rectified his miscalculation, in order to give her the 10,000*l.*; but there is here no gift to Lady Hampden of 2500*l.* a year. The other authorities, which have been cited, refer to cases of specific legacies. Here the testator makes certain bequests in his wife's favor; he expresses his belief that those bequests, together with *other property to which she will be entitled, [*27] will make up more than 2500*l.* a year; and he adds, that, if he did not know what was thus secured to her to be more than equal to her wishes, he would give her more. The words which he has used cannot be strained further in Lady Hampden's favor than if he had said, "If 2500*l.* a year were not enough for her very moderate wants, I would give her more than I have done." The language of the will is not sufficiently precise to justify the court in throwing a burden of 700*l.* a year on the testator's residuary personal estate. *Smith* v. *Maitland*,(*a*) *Hotham* v. *Sutton*.(*b*)

If Lady Hampden is entitled to have her income made up to 2500*l.* a year, the house must be included. The words, "together with the above bequests," will in fact be rejected, if the principal of those bequests be excluded from the estimate.

Mr. *Horne*, Mr. *Skirrow*, and Mr. *Stuart*, for some of the defendants.

The Master of the Rolls:—The house in Berkeley Square, together with the furniture and its other contents, which are enumerated in the will, were plainly intended by the testator for the personal use and enjoyment of Lady Hampden, and were not considered by him as part of her income.

The other part of the will may be read thus:—"I consider that the income, to which Lady Hampden will be entitled after my death, will, with the addition of an annuity of 100*l.*, and the interest of 1000*l.*, which I now give her, make up 2500*l.* a year, which I know will *supply all [*28] her moderate wants, or I would give her more." His expressed intention, therefore, is to give her so much as will make up her annual income, 2500*l.*; and his miscalculation cannot defeat that intention.

It is to observed, that his intention was, that she was to have 2500*l.* and no more; and if the money standing in her name in the funds, with the other properties to which she was entitled at his death, and the annuity of 100*l.* and the interest of the 1000*l.*, had exceeded the 2500*l.* a year, she would have been put to her election between that excess of income and the annuity of 100*l.* and the 1000*l.*

Declare, therefore, that Lady Hampden is entitled to have the 700*l.* a year deficiency made up out of the testator's residuary estate."

(*a*) 1 Ves. jun. 362. (*b*) 15 Ves. 319.

[*29] *CHISSUM *v.* DEWES.

ROLLS.—1828; July 21.

The unexpired term in a house, and the good will of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt: Held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the good will, or from the value of the lease independently of the good will.

An administrator does not lose his right of retainer by paying the assets into court.

Where the fund in court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied.

THE trustees of Great Dover street, by lease dated the 16th of March, demised a house to Dewes for the term of fourteen years, to commence from the 10th of October, 1812, at a yearly peppercorn rent; and in it they covenanted, that the lessors would not, at the expiration of the term, make any claim on the head landlord for any benefit of renewal. Dewes, who carried on the business of an upholsterer on the premises, deposited his lease with Dickenson as a security for a debt.

A creditor's suit having been instituted, after Dewes' death, for the administration of his assets, the lease of the house, with the good will of the business established in it, was, in 1823, put up to sale under the decree and with the concurrence of Dickenson's executor. Of the term, only three years and one quarter were then unexpired. The lease and the good will were sold for 1000*l.*, which was much less than the amount of the debt due to Dickenson; and the money was paid into court, to abide the result of the claim of the equitable mortgagee.

Mr. *Bickersteth* and Mr. *Heberden*, for the plaintiff.

Mr. *Horne* and Mr. *Wilbraham*, for the personal representative of Dewes.

[*30] *On behalf of both plaintiff and defendant it was urged, that the equitable pledge extended only to the lease, and not to the good will of the business carried on in the premises; that the good will had been expressly included in the sale; that, in fact, the greater part of the purchase money had been given for the good will; that, therefore, it ought to be referred to the master to determine what proportion of the 1000*l.* was to be considered as the purchase money of the lease, and what proportion of it as the purchase money of the good will; and that only the former portion of the fund ought to be paid to the equitable mortgagee.

Mr. *Treslove*, contra, for the executor of Dickenson.

THE MASTER OF THE ROLLS:—The good will of the business is nothing more than an advantage attached to the possession of the house; and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the good will from the lease.

The whole of the proceeds of the sale was ordered to be paid to the mortgagee.

A part of the general personal estate had been paid into court by the administrator, and another part of it remained in his hands; but there was a debt due to him from Dewes, greater in amount than both funds. He claimed, by virtue of his right of retainer, to keep what was in his hands, and to have the whole fund in court paid to him in satisfaction of his debt.

*There were no other assets to satisfy the general body of creditors, [*31] or even to pay the costs of the plaintiff.

Mr. *Bickersteth* submitted, that, as to the assets in court, the personal representative lost his right of retainer by having parted with the money, and, at all events, that his right of retainer could not prevail against the plaintiff's right to have the costs of the suit defrayed out of the fund which his suit had brought into court.

THE MASTER OF THE ROLLS was of opinion, that the administrator's right of retainer was not affected by the circumstance of his having paid the money into court,[1] and that the plaintiff was not entitled to have his costs satisfied out of a fund to which the right of retainer extended.[2]

Afterwards the administrator consented, that the plaintiff should have his costs out of the fund in court.

[1] "They [the executors] have clearly a right to retain their debt. The fact of the money having been brought into court can make no difference. The debt of the executors being a simple contract debt, the court will not allow them to keep the fund in their possession; but the court will, nevertheless, ultimately place them in the same position as if they had kept it in their hands. If an executor says, 'I have paid so much money in satisfaction of debts,' he is not charged with it, or if he is charged with it, he is allowed it in his discharge; but the court does not give the same effect to the allegation, 'I have retained so much for my own debt' The rule is to consider the executor as having a right to retain in a due course of administration; but the court says, until the accounts are taken it cannot see that the right of retainer will exist. When the court has determined that there is no creditor of a higher degree than the executor, he must be remitted to his original position, to which the right of retainer was incident; and he is entitled to retain his debt in preference to the costs of administering the funds, for to that extent he is in the same situation as a creditor whose debt was paid before the suit, and who cannot therefore be afterwards affected by the costs of administration. *Chissum* v. *Dewes* decided this very point, and I shall follow that authority." Wigram, V. C., *Tipping* v. *Power*, 1 Hare, 405, 11. See further as to retainer, *Kent* v. *Pickering*, 2 Keen, 1, 8, n. 1.

[2] Vide *Larkins* v. *Paxton*, 1 Russ. & M. 426, *Rowlands* v. *Tucker*, id. 635. But subsequent decisions establishing the right of the prosecuting creditor to costs, as between solicitor and client, out of a deficient fund, seem to be inconsistent with the decision in *Chissum* v. *Dewes*. See *Hood* v. *Wilson*, 2 Russ. & M. 687. *Larkins* v. *Paxton*, 2 Myl. & K. 320. *Brodie* v. *Bolton*, 3 Myl & K. 168. *Stanton* v. *Hatfield*, 1 Keen, 358, 362, n. 1. *Sutton* v. *Doggett*, 3 Beav. 9. *Tootal* v. *Spicer*, 4 Sim. 510. *Barker* v. *Wardle*, 2 Myl. & K. 818.

[*32] *DAWES *v.* SCOTT.

ROLLS.—1828; July 23.

Personal estate may be exempted from the payment of debts, without express words to that effect, upon the clear intention of the testator.

THE testator, John Dawes, by a will bearing date the 18th of August, 1812, devised his estate at Highbury in manner therein mentioned; but did not, by that will, devise any other part of his real estate, or in any manner affect his personal estate.

The testator, by another will, bearing date the 23d of June, 1818, confirmed his prior will, and devised his estate at Charleywood, and all his plate, linen, books, pictures, and other household furniture and effects which should belong to him at the time of his death, except such articles of plate and other personal effects as his trustees should think proper to select, in order that they might remain in his family, upon trust to be sold, and, out of the moneys to be produced by the sale, in the first place to pay and satisfy all his just debts, funeral and testamentary expenses and legacies. He then gave several pecuniary legacies; and in case, after paying and satisfying his said debts, funeral expenses and legacies, there should remain any surplus of the moneys to arise by such sale, he directed his trustees to pay the same to his brother Robert John Dawes; and he thereby declared that the moneys to arise as aforesaid should be the fund primarily applicable to the discharge of his said debts, funeral and testamentary expenses, and legacies. The testator then devised his estate in the county of Westmoreland, to his brother Robert John Dawes for life, with remainder in strict settlement to his children, with divers remainders over; and he directed that the articles of plate and [*33] effects, which should be selected by his trustees as *aforesaid, should go as heir looms with this estate. And as to all other his lands, tenements, and hereditaments, and real estate not thereinbefore devised, nor devised by his will of the 18th of August, 1812, and all moneys, stocks, funds, and securities for money, and all other his personal estate and effects not thereinbefore bequeathed, he gave the same to his brother Robert John Dawes, his heirs, executors, and administrators.

The testator afterwards made a codicil, reciting the devise and bequest, in his second will, of his estate at Charleywood and of his personal estate on trust to be sold. By this codicil, after stating that, amongst the debts to be paid out of the produce of the sale, it was his intention that all charges upon or affecting his Highbury estate should be included, and reciting that his brother Robert John Dawes had died, he gave to his brother Harry Dawes all the surplus or residue to arise from the sale aforesaid, which he had before given to Robert John Dawes, and also all his other messuages, lands, hereditaments, and personal estate by the said will also given to the said Robert John Dawes. He then gave an additional pecuniary legacy of 2000*l.*, di-

recting that it should be paid out of the produce of the said sale, and that such moneys should be the primary fund for payment thereof: and he declared, that, in case the moneys arising from the said sale should be insufficient to pay and discharge his just debts, funeral and testamentary expenses, and legacies bequeathed by his will of the 23d of June, 1818, and that codicil, including the charges on the Highbury estate, he thereby charged his Highbury estate with the payment of so much money, as should be requisite to make good the deficiency.

The produce of the sale of the Charleywood estate, and of the articles directed to be sold therewith, was not *sufficient to pay the testator's [*34] debts, funeral and testamentary expenses, and legacies: and the question was, whether the moneys, securities for moneys, and other personal estate, given by the will of the 23d of June, 1818, to Robert John Dawes, and by the codicil to Henry Dawes, should not be applied to make good the deficiency, before recourse was had to the Highbury estate.

Mr. *Treslove*, and Mr. *Duckworth*, for the plaintiffs, argued, that, according to the principle laid down in *Bootle* v. *Blundell*,(*a*) the Highbury estate was a secondary fund for the payment of the debts, funeral expenses, and legacies, which, in the event of the deficiency of the primary fund, was to be applied in exoneration of the personal estate.

Mr. *Bickersteth*, and Mr. *Purvis*, for the devisees of the Highbury estate, contended, that the Highbury estate, though charged, was charged only as auxiliary to that which was the natural fund for the payment of debts and legacies.

THE MASTER OF THE ROLLS:—It is not necessary that there should be words expressly exempting the personal estate, if the instruments afford a clear intention on the part of the testator that it should be exempted. The Charleywood estate, and the articles to be sold therewith, are expressed to be the primary fund; and the plain intention of the testator is, that the Highbury estate should be the secondary fund.[1]

GREEN *v.* JACKSON. [*35]

ROLLS.—1828; July 23.

Where a testator directs his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gives the residue of the mixed fund to A. and B., the failure of the charitable legacies as far as they would affect the real estate, will enure to the benefit of A. and B.

JOSEPH CHAPMAN, by his will, dated the 7th of February, 1816, after bequeathing to his wife a sum of 200*l.* and certain specific articles, gave all his

(*a*) 1 Mer. 193.

[1] Vide *Driver* v. *Ferrand*, 1 Russ. & M. 681. *Welby* v. *Rockliffe*, id. 571. Lloyd & G. 295, n. (*b*). Taml. 142, note. 2 Myl. & Cr. 709, n. 3. *Rhodes* v. *Rudge*, 1 Sim. 85. *Colville* v. *Middleton*, 3 Beav. 570. *Jones* v. *Bruce*, 11 Sim. 228.

personal estate and effects to Thomas Jackson, George Greenwood, Thomas Hugall, and John Hudson, their executors or administrators, upon trust to pay some legacies. There followed specific devises of parts of his real estate, intermingled with bequests of sums of money; after which the testator devised certain tenements, particularly described, "and all other my real estate whatsoever, and wheresoever situate, not hereinbefore specially devised as aforesaid, unto my said trustees Thomas Jackson, George Greenwood, Thomas Hugall, and John Hudson, their heirs and assigns, upon trust that they my said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, shall and do, as soon as conveniently may be after my decease, sell and dispose of all such my said last mentioned real estates for the best price or prices that can be reasonably had or gotten for the same; and it is my will and mind that all the moneys to be received by my said trustees by sale of all my said above mentioned real estates, and by virtue of the bequests of my said personalty, and all other my moneys which may come to their hands, after my debts and legacies, and the two several sums directed to be sunk by way of annuity, and all costs, charges, and expenses attending the execution of this my will, are paid, satisfied, and provided for, shall be by them my said trustees placed in one of the banking-houses in Hull, till the whole can be collected and got in, except the 4000*l.* part of my personalty, arising from *Messrs. Brooke & Pease, and Mr. Richard Thompson's mortgages, and also except the 2000*l.* of which my wife is also to receive the interest during her life or widowhood, and which two sums are to be applied by my trustees, on the death or marriage again of my said wife; and after the amount of such money is ascertained, and the same lodged at interest in one of the banking-houses in Hull, as above mentioned, I direct that my said trustees, or the survivors or survivor of them, or the executor or administrator of such survivor, shall or do, on the death or marriage again of my said wife, but not before one of those events shall have taken place, put into the hands of the vicar, &c;" and then came directions to pay considerable sums for particular charitable purposes. "And I do direct," continued the testator, "that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do, on the death or marriage again of my said wife, but not before one of those events shall have taken place, pay and apply all the residue of the moneys which shall then be in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests as above mentioned, unto and among all and every the children who shall be then living of my said half-nephews Thomas Chapman, William Chapman, Philip Chapman, and Thomas Sutton, my said late half-nephews Samuel Chapman and John Chapman, and my said half-nieces Eleanor Chapman, Mary Wells, Ann Owton, Susannah Simpson, Ann Briggs, Margaret Fields, Ann Gray, Eleanor Ash, in equal shares, to be paid at their respective ages of twenty-one years, with interest in the meantime towards their support."

[*36]

The bill was filed by the next of kin of the testator, one of whom was also his heir at law.

*It was admitted that the charitable legacies failed in the proportion [*37] which the produce of the real estate bore to the produce of the personal estate; and the question in the cause was, whether that failure enured to the benefit of the heir at law, or of the next of kin, or of the persons described in the residuary gift.

Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth*, for the plaintiffs:—To the extent to which the legacies, that have failed, would have fallen upon the produce of the real estate, there is no disposition of the beneficial interest in that produce; that portion of the fund, therefore, must go to the heir at law; and in his hands it will have the character of personalty. *Jones* v. *Michell*,(*a*) *Attorney General* v. *Johnson*,(*b*) *Davers* v. *Dewes*,(*c*) *Collins* v. *Wakeman*,(*d*) *Hutcheson* v. *Hammond*.(*e*)

The case of *Gibbs* v. *Rumsey*(*g*) is in words almost the same with the present; and there Sir William Grant says, "Such part of the real estate, as is given to charitable purposes, belongs to the heir at law, and does not go either to the next of kin or the residuary legatee." *Durour* v. *Motteux*(*h*) is an anomalous case, which is not reconcilable with the current of authorities; and the language, upon which the question arose there, is different from that which this testator has used.

Mr. *Pepys*, for the widow of the testator, contended against the claim of the residuary legatees.

*The counsel for the residuary legatees were not called upon to [*38] support their case.

THE MASTER OF THE ROLLS:—The testator, Joseph Chapman, devised his real estates to three trustees, to be sold, and the produce thereof, together with his personal estate, to be applied in payment of his debts and legacies, and amongst others, in payment of several charitable legacies, and directed that the residue of the moneys which should remain in the hands of his trustees, who were also named his executors, after full satisfaction and discharge of the aforesaid several payments and bequests, should be divided between certain persons described in his will.

It is perfectly settled, that, if a testator directs his real estate to be sold, and the produce, or any part of it, to be applied for a particular purpose only, and that purpose fails, the money intended for that purpose retains the quality of real estate, and belongs to the heir. But here the testator had a purpose ulterior to the payment of his legacies, namely, the purpose of division among the several persons described in his residuary gift. The case of *Gibbs* v. *Rumsey* is principally relied upon for the heir; but the facts of that case are not distinctly stated, and the argument there turned upon another point. The

(*a*) 1 Sim. & Stu. 290. (*b*) Ambler, 577. (*c*) 3 P. Wms. 40.
(*d*) 2 Ves. jun. 683. (*e*) 3 B. C. C. 128. (*g*) 2 V. & B. 294.
(*h*) 1 Ves. sen. 321; but stated more correctly in the note, 1 Sim. & Stu. 392.

case of *Durour* v. *Motteux* is precisely in point; and, upon the authority of that case, as well as upon principle, my opinion is, that the failure of the charitable legacies here enures for the benefit of the persons described in the residuary gift, and that no distinction can here be made between that part of the residue which has arisen from the real estate and that part which has arisen from the personal estate.[1]

[*39] *FOWLER *v.* RICHARDS.

ROLLS.—1828; July 23.

A. appoints executors, who prove his will in the prerogative court; B., the surviving executor, dies, having appointed C. his executor, and C. proves B.'s will in the consistory court of Landaff: C. is the personal representative of A.

JOHN SMITH, by his will, made a specific disposition of certain sums of

[1] Affirmed by Lord Lyndhurst, 2 Russ. & M. 238. A testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale to be considered and taken as part of her personal estates; she then willed, that out of the moneys to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime; it was held, that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law. *Amphlett* v. *Parke*, 2 Russ. & M 221. S. C. 1 Sim. 275. S. C. 4 Russ. 75. A testator, by will duly attested, gave all his real and personal estate to trustees, to convert into money and pay his debts and then to appropriate and take out of his said trust moneys 1000*l.* which he gave to the plaintiff, his heir at law. By a codicil not properly attested so as to pass real estate, he revoked the legacy: and it was held, that on this will the testator had made his real and personal estate a common fund for payment of this legacy: that the revocation was inoperative as regarded the real estate, and that the plaintiff was entitled in the proportion which the real estate bore to the personal. *Stocker* v. *Harbin*, 3 Beav. 479. A testator devised and bequeathed his real and personal estate, in trust to sell, and constituted a mixed and blended fund, out of which he gave J. B. 100*l.* and one-eighteenth of the residue, and he gave the remaining portions of the residue to other persons; and J. B. having died in the testator's life time it was held that the next of kin and heir were entitled to their proportionate part of the lapsed share of the residue, and that the legacy of 100*l* fell into the residue and passed by the gift thereof: and Lord Langdale, M. R. says; "The real estate is by the will directed to be converted into money, *i. e.* into personal estate, for the purposes of the will; the testator thereby determined the quality of the property which the legatees were to take; but he has expressed no intention to convert it for any purposes, other than those mentioned in the will; and to the extent to which those expressed purposes have failed; that is, as to any part of the property in respect of which no intention of the testator is expressed, the law is to determine to whom it belongs; and the two sorts of estate being blended, each contributing in proportion, to fulfil the purposes which can be accomplished, the share of residue which has lapsed must be deemed to consist of proportionate parts of the two sorts of estate; and that being so, the proportion of the lapsed share of residue which consists of the produce of real estate, having been directed to be converted for a purpose which is disappointed, belongs to the heir. It is not easy to reconcile all the cases which are to be found in the books on these subjects, &c. It appears to me that the proper course is to follow the decisions of *Durour* v. *Motteux*, (1 Ves. sen. 520. 1 Sim. & Stu. 292,) and *Green* v. *Jackson*" *Salt* v. *Chattaway*, 3 Beav. 576.

stock, standing in the name of the trustees of his marriage settlement, and to which, subject to the life interest of his wife therein, he was entitled absolutely. He died in 1776; and, upon the death of his wife, in 1820, the plaintiff, the legatee who derived his title under the will of John Smith, filed his bill for a transfer of the stock against Richards, who was the personal representative of the survivor of the trustees. At the hearing of the case, the defendant objected, that the suit was defective, because there was no personal representative of Smith before the court. The objection was allowed; and the cause was ordered to stand over, with liberty to the plaintiff to amend his bill by adding parties.

John Smith had appointed five executors, of whom only Lovell and Morgan proved his will; and they proved it in the prerogative court of Canterbury. Lovell had been long dead, and it was admitted that Morgan was the sole survivor of the five persons named executors in the will. Accordingly the bill was amended by making Morgan a defendant; but shortly afterwards he died, having made a will, by which he appointed George Webber and Maria Matthews his executor and executrix. They proved his will in the consistory court of the bishop of Landaff; but, as their testator had not *bona notabilia* out of the diocese of Landaff, they did not obtain probate in the prerogative court. In this state of circumstances, the plaintiff, in order to make the suit perfect, filed a bill of revivor and supplement against [*40] Webber and Matthews, as the personal representatives of the original testator, Smith.

At the hearing of the cause it was objected, that Webber and Matthews were not the personal representatives of Smith, because they had not proved Morgan's will in the prerogative court. Morgan was the executor of Smith by virtue of a prerogative probate; and it was contended that the chain of representations could be maintained only by a succession of probates from the same court.

Mr. *J. Martin*, for the plaintiff.

Mr. *Garratt*, for the defendant.

THE MASTER OF THE ROLLS directed, that the cause should stand over, in order that the opinion of a civilian might be taken, and that inquiry might be made as to the practice and doctrine of the ecclesiastical courts on the subject.

A case was accordingly submitted to Dr. Lushington; and his opinion was, that Webber and Matthews had not clothed themselves with the legal character of personal representatives of John Smith;(a) but it was admitted that there was no express authority upon the question.

(a) The opinion was as follows: "The original probate of John Smith's will was from the prerogative court. Morgan, being the sole surviving executor, became his only personal representative. The executors of Morgan, by proving the will at all, put themselves in a situation to be compelled to become the personal representatives of John Smith. I think, by proving Morgan's will at Landaff, they have not clothed themselves with the legal character of personal representatives to John Smith;

[*41] *The case being mentioned again, Mr. *Preston*, *amicus curiæ*, referred to the dicta in *Wankford* v. *Wankford*,(a) and stated, that some civilians thought, that, to complete the representation to a testator, it was not necessary that his will, and the will of his executor, should be proved in the same court.

THE MASTER OF THE ROLLS was inclined to think that the chain of representation was complete, whether the will of the executor was proved in the same court with the will of the original testator, or in a different court.

[*42] *On a subsequent day, the MASTER OF THE ROLLS held, that Webber and Matthews were the personal representatives of John Smith; and the decree was made accordingly.[1]

MUTTER *v.* CHAUVEL.

ROLLS.—1828; June 28, 30; July 7, 25.

Where much expense had been incurred in the suit, and it appeared defective in form at the hearing, the court directed the cause to stand over, with liberty to file a supplemental bill to correct the form.

THE plaintiff, in 1815, filed his bill, as being nominated by his father, who claimed the equitable right of nomination to the church of Little Stanmore, against the defendant Chauvel, who was the incumbent in possession, and

but, by having thus taken upon themselves the execution of Morgan's will, I think they cannot now refuse to prove Morgan's will in Canterbury for the sole purpose of thereby carrying on the chain of executorship. I do not say, that, under very peculiar circumstances, the prerogative court would not grant to others some special limited administration; but by virtue of the Landaff probate they cannot act as the executors of John Smith, though by taking it they have bound themselves to take such other grant as may be requisite from another court to carry on a legal representation to John Smith.

"I am of opinion that the question as to whether Webber and Matthews be the personal representatives of John Smith, has nothing to do with the fact of John Smith's having or not having property in Landaff. If John Smith had property in Landaff, his will being proved in Canterbury, I think the executors of his surviving executor would not, under a Landaff probate, administer John Smith's effects. I think that, having a Landaff probate only, they would not be sued, as the executors by representation of John Smith, by a creditor of John Smith. I apprehend that they must first be compelled to prove Morgan's will in Canterbury.

"I find no authority upon these questions, though I have made search and inquiry. The principle, upon which my opinion is founded, is, that in order to show that the executor of an executor is entitled to administer the goods of the first testator, it must be shown by legal evidence that he is the executor of the deceased executor. Of this probate alone is evidence; and I think that a Landaff probate is not evidence that the executor of the second testator was executor out of Landaff."

(a) 1 Salk. 299. 309.

[1] By the Revised Statutes of New York, (vol. 2, p. 21, § 45,) the executor of a sole executor, or of a surviving executor, can no longer administer on the estate of the original testator, but an administrator *cum testamento annexo* must be appointed.

certain other persons who claimed the right of presentation, for an account of the rents and profits from the time of his nomination.

In 1824 the plaintiff amended his bill, and stated, that the equitable right of nomination, which his father had claimed, had, by the effect of his father's will, and a certain deed of release executed by his sisters, become vested in him, the plaintiff: and the amended bill prayed that it might be declared that he was entitled to the equitable right of nomination.

At the hearing of the cause, the MASTER OF THE ROLLS was of opinion, without entering into the merits of the case, that the title of the plaintiff to the incumbency of Little Stanmore could not be sustained, by reason of the form of the instrument executed by the plaintiff's father: and, it appearing, upon reference to the proofs and admissions in the cause, that the deed of release from his sisters to the plaintiff, which formed an essential part of the plaintiff's title to the right of nomination which his father had claimed, was not executed till the 12th of *May, 1828, the Master of the Rolls [*43] was of opinion, that the court could not enter into the consideration of the plaintiff's claim to the right of nomination; because, as the record then stood, a decree, affirming his title to the nomination, would have reference to the date of the bill, and would affirm title in the plaintiff at that time. But the Master of the Rolls, stating that great expense had been incurred in the proceedings, and that it would, therefore, be desirable for all parties that the question of the right of nomination should be decided in this suit, directed the cause to stand over, and that the plaintiff should be at liberty to file a supplemental bill for the purpose of regularly introducing the release from his sisters.

Mr. *Sugden* and Mr. *Norton*, for the plaintiff.

Mr. *Horne* and Mr. *Phillimore*, for Mr. Chauvel.

Mr. *Pepys* and Mr. *Tinney*, for trustees who concurred with Mr. Chauvel in resisting the claim of the plaintiff.

In re REDMUND. [*44]

ROLLS.—1828; July 25.

A clerical error in the enrolment of the specification of a patent will be amended.

LETTERS patent for making and using a certain invention were granted on the 9th of November, 1821, and the specification was duly enrolled. No office copy had yet been applied for or delivered out.

The patentee stated by a petition, that, within the last month, he had discovered that the copying clerk, in engrossing the specification and the plan annexed to it, had by mistake transposed the numbers, by which, in the specification, reference was made to the plan. His prayer was, that this clerical error in the enrolment of the specification might be amended.

Mr. *Beames*, for the petition.

THE MASTER OF THE ROLLS made the order.[1]

[*45] *FARQUHARSON *v.* SETON.

ROLLS.—1828; July 2, 4, 8, 21, 25.

A second incumbrancer filed a bill in Grenada, to which the mortgagor and first incumbrancer were parties defendants, impeaching one of the deeds under which the first incumbrancer claimed, and praying that the equity of redemption of the mortgaged premises might be sold. By a decree made in that suit, the court in Grenada declared the impeached deed void, the effect of which was to reduce considerably the claim of the first incumbrancer: he, therefore, appealed from that decree to the privy council, who reversed the decree of the court in Grenada, and established the deed in question. Before that suit was finally concluded, the mortgagor filed a bill here against the first incumbrancer for redemption, praying that the same deed might be declared void, which had been affirmed by the privy council:—his bill was dismissed with costs, on the ground that he was concluded by the decree of the privy council from raising, in a new suit, the question as to the validity of that instrument.

IN 1794, the defendant Seton contracted for the purchase, at the price of 60,000*l.*, of a plantation called Dunfermline, in the island of Grenada, with the slaves, stock and utensils attached to it. An insurrection of the slaves, which occurred shortly afterwards, prevented the immediate completion of the contract, and greatly lessened the value of the property; and an arrangement was subsequently entered into, by which the purchase money with interest, amounting in the whole to 81,900*l.*, was to be paid by eleven annual instalments, on the 1st of October, 1797, and the 1st of October, in each of the ten succeeding years. The first instalment having been paid, the estate was, by indentures of lease and release, dated the 21st and 22d of August, 1798, conveyed to Seton in fee, subject to a term of years, for securing to the vendors the remaining ten instalments.

In the mean time, Seton had been negotiating for the sale of the property to Barclay Farquharson and John M'Pherson, who carried on business under the firm of Barclay Farquharson & Co. The first agreement, dated the 10th of March, 1797, and signed by both Farquharson and M'Pherson, fixed the price at 58,860*l.*, payable by three instalments at twelve, eighteen, and twenty-four months, exclusive of a further sum of upwards of 5000*l.* for the growing crops, negroes, supplies, &c. Barclay Farquharson & Co. drew bills for the amount on their correspondents in London, and were let into [*46] possession *of the plantation. The bills were dishonored; and, in the absence of Farquharson, who, in the mean time had left the West Indies and returned to England, M'Pherson concluded a new agreement with Seton, dated the 4th of August, 1797, and signed by him, M'Pherson, on his own behalf, and also as attorney for Farquharson, by which the price was to be 120,000*l.*, payable by ten successive instalments of 12,000*l.*, and secured

[1] As to the extent of the jurisdiction of the Master of the Rolls to alter the enrolments of the specifications of patents, see *In re Sharp's Patent*, 3 Beav. 245.

by a mortgage of the estate. In March, 1798, it was arranged by Seton and M'Pherson, that these yearly payments should be divided into two sets of instalments:—one set, amounting in the whole to 69,700*l.*, payable on the 1st of October in each successive year, and corresponding exactly with the ten yearly payments which Seton had to make to his vendors; and the other set, payable on the 1st of January in each successive year, and amounting in the whole to 50,300*l.* The first of the first set of instalments, being a sum of 8120*l.*, was paid; and by indentures of lease and release, dated on the 25th and 26th days of December, 1798, the estate was conveyed to Farquharson and M'Pherson as tenants in common in fee, subject to a term of 1000 years, for securing the remaining nine instalments of the sum of 69,700*l.* In these deeds there was no mention of, or reference to, the other set of instalments; neither was there any allusion to the sum of 50,300*l.*, which was their amount; and there was an express proviso that the term should cease on payment of the residue of the 69,700*l.* But Farquharson and M'Pherson afterwards executed deeds of lease and release, dated the 10th and 11th of October, 1799, by which (after reciting that the price agreed to be paid was 120,000*l.*—that the one set of instalments, amounting to 69,700*l.*, had been paid or secured in the manner above mentioned—and that it had been agreed that the 50,300*l.*, the amount of the other set of instalments, should be secured by certain bills of exchange, and also *by a mortgage of the [*47] premises,) the property was conveyed to William Elderton Allen, upon trust for securing to Seton so much of the 50,300*l.* as was then unpaid.

Default being made in payment of the instalments, Seton, in 1801, took possession of the plantation as mortgagee.

In 1800, Farquharson and M'Pherson, along with one Perras, who was alleged to be a partner in their trade, executed to Macdonald and Macnure a bond, and a warrant of attorney to confess judgment, as securities for sums to a large amount owing from Farquharson's house to Findlay, Bannatyne & Co. and other persons. Judgment was entered up on the warrant of attorney; and, in 1802, execution was sued out upon it; but the provost marshal of the island returned *nulla bona:* and, in November, 1803, Macdonald and Macnure, on behalf of the creditors for whom they were trustees, filed a bill in the chancery of Grenada against Farquharson, M'Pherson, Perras, Seton, and his trustee Allen.

This bill alleged, that Seton, in the beginning of 1797, contracted with Farquharson and M'Pherson to sell them the Dunfermline plantation, with its appurtenances, for 69,700*l.* payable by the instalments therein mentioned: that Seton, in pursuance of this contract, delivered up possession of the premises to Farquharson and M'Pherson, and that the property was subsequently conveyed to them by the indentures of the 25th and 26th days of December, 1798: that the sum of 69,700*l.*, mentioned in the indenture of release of the 26th of December, was the true price and consideration agreed to be paid for the plantation, with the negroes, slaves, and other appurtenances there-

unto belonging, and considerably exceeded its real value: that, afterwards, the house of Barclay Farquharson & Co., having met with many [*48] losses and disasters *in trade, and being reduced to the utmost state of distress, Farquharson and M'Pherson became anxious to favor Seton to the prejudice of their other creditors, and particularly of those for whom the plaintiffs were trustees, and for that purpose entered into a secret contrivance with Seton, in pursuance of which the indentures of the 10th and 11th of October, 1799, were executed: that the price of 120,000*l.*, mentioned in the indenture of release bearing date the 11th of October, 1799, was a false and pretended consideration: that, at the time when Farquharson and M'Pherson contracted with Seton for the purchase, it was not agreed that Farquharson and M'Pherson should pay to Seton the sum of 120,000*l.* for the plantation, or that the sum of 69,700*l.* should be secured or paid as a part of the 120,000*l.*, or that the sum of 50,300*l*, residue of the pretended purchase money of 120,000*l.*, should be paid by the several instalments or secured by the several bills of exchange mentioned in the deed of the 11th of October, 1799: that such bills of exchange, if they were ever drawn, were not in truth drawn by Barclay Farquharson & Co. on the day on which they bore date, but were drawn long afterwards, in furtherance of the before-mentioned contrivance to favor Seton to the injury of the other creditors of the firm: that neither Farquharson and M'Pherson nor Seton ever caused the indentures of the 25th and 26th of December, 1798, to be recorded or registered in the register's office of the island of Grenada: that those deeds would have been wholly suppressed and cancelled, had they not accidently fallen into the custody and possession of Findlay, Bannatyne & Co.; and that the mortgage debt, *bona fide* due to Seton, had been so much reduced by the crops which he had received since he had been in possession as mortgagee, that the equity of redemption was nearly sufficient for the satisfaction of the judgment creditors. The prayer was, [*49] that the indentures of the 10th and 11th of October, *1799, might be vacated and set aside as fraudulent: that the indentures of the 25th and 26th days of December, 1798, might be established and be declared to contain the only claims of Seton upon the plantation: that various accounts might be taken, so as to ascertain the amount due to Seton for the instalments of the purchase money; and that the equity of redemption, so relieved, might be sold.

To this bill Seton put in an answer, insisting, in substance, that 120,000*l.* was the amount of the consideration agreed, *bona fide*, to be paid by Farquharson and M'Pherson for the purchase of the Dunfermline plantation; and that the indentures of the 10th and 11th days of October, 1799, were a valid mortgage, for securing to him so much of that sum as still remained due.

Farquharson, by his answer, after stating the agreement of March, 1797, alleged, that, on the 4th of August in the same year, M'Pherson entered into a new contract with Seton for the purchase of the plantation at 70,000*l.*; and he set forth a sketch or abstract of the latter agreement, which had been, at

the time, transmitted to him by M'Pherson. He further stated, that, in pursuance of this agreement, possession of the estate was delivered to Farquharson & Co., and the deeds of December, 1798, were executed; that the sum of 69,700*l.*, mentioned in the indenture of the 26th of December, 1798, was the true price agreed to be paid for the plantation and appurtenances; that Seton afterwards pretended, for a reason which was specified, that the agreement of August, 1797, did not take effect, and that he was therefore entitled to enforce payment of the bills which had been drawn for the purchase money under the agreement of March, 1797; that Seton, as the only condition on which he would forbear to enforce immediate *payment of [*50] those bills, proposed to M'Pherson to extend the term for the payment of the purchase money to ten years, provided the amount of it were fixed at 120,000*l.*, instead of 69,700*l.*; that bills of exchange for the sum of 120,000*l.* were accordingly drawn, in the West Indies, by M'Pherson, in favor of Seton, and were accepted by him, Farquharson, in London, without any knowledge at that time that they had been drawn in pursuance of such agreement and proposal for forbearance; that, in May, 1799, M'Pherson, having arrived in London, informed him, Farquharson, of the agreement under which the last mentioned bills of exchange had been drawn, and further added, that it was become necessary to secure Seton by a fresh mortgage for the sum of 120,000*l.*, in consideration of his forbearance; that he, Farquharson, thereupon remonstrated with M'Pherson on the ruinous nature of the agreement, and threatened to consult the house of Findlay, Bannatyne & Co., but M'Pherson represented to him, that his, M'Pherson's, character would be ruined, if such a transaction should transpire, and that, on the proposed mortgage being completed, Seton, who had already pledged his honor that it should never be recorded, except in case of dire necessity, would advance to them the further sum of 20,000*l.* on their joint bond; that, in consequence of these representations, and of the proposed loan, and of the distressed state of the house, he, Farquharson, and M'Pherson did consent to and sign the indentures of the 10th and 11th of October, 1799; that Seton advanced to them the sum of 20,000*l.* on their joint bond, in order to induce them to execute those indentures; and that he at the same time declared, that the last mentioned mortgage should not be put on record or registered, except in case of absolute necessity. Farquharson, also, by his answer, expressed his willingness that the plantation, with its appurtenances, should be sold for the satisfaction *of the judgment debt due to the plaintiffs, M'Donald, [*51] and M'Nure.

M'Pherson did not put in an answer, in consequence, it was stated, of his being at the time out of the jurisdiction of the colonial court.

The cause came on to be heard in the court of chancery in Grenada in May, 1807, when a decree was made, declaring that the deeds of the 10th and 11th of October, 1799, were to all intents and purposes null and void as being fraudulent against fair creditors, and that the mortgage therein mentioned was of non-

effect; and it was further declared, that the prior deeds of the 25th and 26th of December, 1798, whereby the estate was sold for the sum of 69,700*l.* were the real and true deeds by which the estate was conveyed, and contained the only just claims of Seton in and upon the estate.

Seton appealed to the king in council: and, in February, 1815, the privy council reversed the decree of the court below, and established the deeds of the 10th and 11th of October, 1799. It did not appear that any person, except the plaintiffs in the suit, had been served with the appeal, or been heard in support of the decree of the court below.

In that suit a receiver had been appointed, who was afterwards discharged. With the exception of the interruption occasioned by this appointment, Seton had been in the continued possession of the plantation since 1801.

Pending the appeal, the plaintiffs had compelled Seton to pass his accounts upon the footing of the decree of May, 1807. After the decision of [*52] the privy counsel, *they abandoned the prosecution of that suit: but, under orders made by the court below upon Seton's application, the accounts already passed were re-stated upon the footing of the order of the privy counsel; and the subsequent accounts were passed before the master up to December, 1822.

In 1818, Farquharson filed the present bill. After detailing various prior transactions, it alleged that M'Pherson and Seaton, during the plaintiff's absence from the West Indies, concerted a scheme for enabling Seton to obtain from the plaintiff an excessive and unreasonable price for the Dunfermline plantation; that the agreement, dated the 4th of August, 1797, was entered into in pursuance of such scheme, and without the plaintiff's knowledge or consent; that M'Pherson, in pursuance of the same scheme, and in order to deceive the plaintiff, sent to the plaintiff a letter dated the 6th of August, 1797, in which he mentioned that he had come to an agreement with Seton for the purchase of the estate, "an abridged copy of which he enclosed;" that a paper writing, purporting to be a copy of the agreement of the 4th day of August, 1797, was enclosed in this letter, and that, in the copy so enclosed, that part of the agreement, which related to the payment of the sum of 50,300*l.*, was wholly excluded and suppressed; that the letter of the 6th of August was dictated or read over by Seton, before it was sent to the plaintiff; that such exclusion and suppression of that part of the agreement which related to the 50,300*l.* was purposely contrived between M'Pherson aud Seton with the intent of concealing from the plaintiff the fact that any agreement to that effect had been entered into between them; that the plaintiff, when the bills for 50,300*l.* were presented to him, was wholly ignorant of the pur- [*53] pose for which they had been drawn, and accepted them upon a *supposition that they were drawn with reference to an extensive mercantile speculation in which his house of trade and Seton were engaged; that in the autumn of 1789, the plaintiff was for the first time informed that the bills for 50,300*l.* had been drawn on account of the purchase of the Dunfermline

estate; that such information had come to him in consequence of Seton directing the sum of 50,300*l.* to be inserted in the conveyance, as part of the consideration for the purchase; that the plaintiff had immediately insisted that the sum of 50,300*l.* should not be inserted in the conveyance of the estate as part of the consideration, and that Seton accordingly consented to execute, and had executed, the indentures of the 25th and 26th of December, 1798; that, upon the arrival of M'Pherson in England, in May 1799, the truth of the case was explained by M'Pherson; that the plaintiff immediately expressed his determination to take legal measures in order to set aside the bills for 50,300*l.*, and that he had abandoned such determination partly from his regard for Seton's family, with whom he was intimately connected, partly from a reluctance to make the matter public, and partly because he hoped that Seton would consent amicably to deliver up those bills; that the deeds of the 10th and 11th of October, 1799, were executed upon the express agreement and assurance of Seton that he would retain them in his possession, and would not transmit them to Grenada to be registered, and that they should be held as a security, not for the money therein mentioned, but only for 69,700*l.*, and a sum of 20,000*l.* which he was to advance.

The bill contained, also, various charges tending to show that 120,000*l.* was an extravagant price for the estate, and that Seton, by means of the rents and profits, *had long since been paid the whole, even of the [*54] principal sum of 120,000*l.* and interest: and some circumstances were stated, to account for the plaintiff's apparent delay in instituting the suit.

The prayer was, that it might be declared that 69,700*l.* was the only sum of money for which the plantation, slaves, and premises had been well charged by way of mortgage in favor of Seton; that it might also be declared that the indentures of the 10th and 11th of October, 1799, were fraudulent and void as against the plaintiff; that the usual accounts against a mortgagee in possession might be taken on the footing of that declaration; that Seton might be decreed to pay to the plaintiff and M'Pherson the balance which should be found due from him on the taking of those accounts; and that the plantation might be reconveyed to them:—but, in case the court should be of opinion that the sum of 50,300*l.*, as well as the sum of 69,700*l.* was charged by way of mortgage, then that the plaintiff might be let in to redeem and pay off the mortgage of 120,000*l.*, and also the sums of money due to M'Donald and M'Nure and their *cetuis que trust.*

Seton, by his answer, denied the charges of fraud and collusion; and after setting forth the proceedings in the colonial court, and before the privy council, in the suit of M'Donald and M'Nure, insisted upon them as a bar to the present bill.

At the hearing, the counsel relied on those proceedings as a preliminary objection to the case made by the plaintiff.

Mr. *Bickersteth* and Mr. *Wigram*, for the objection:—*The object [*55] of the suit in the colonial court was substantially the same with the

relief which is prayed by the present bill. In the former suit, as in the present, the question was, whether the deeds of October, 1799, were valid? The decree of the privy counsel established these deeds; that decree must be conclusive against all who were parties to the suit in which it was made; and therefore, Farquharson, who was a defendant to the bill filed by M'Donald and M'Nure, cannot be permitted to agitate the same poin t again, and to rehear the judgment of the king in counsel by filing a new bill in this court.

In *Lord Dunsany* v. *Latouche*,(*a*) Lord Redesdale pronounced a decree directing an account between co-defendants: one of the defendants appealed upon that very ground; but the house of lords(*b*) affirmed the decree. On the hearing of the appeal, Lord Redesdale observed,(*c*) "It seems strange to object to a decree, because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled, and acted on, and the constant practice of a court of equity; so much so, that it is quite unnecessary to state any case in its support."—"Where a case," said Lord Eldon,(*d*) "is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants. Further, a court of equity is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter, that may be then decided between him and his co-defendant. And the *co-defendant may insist that he shall not be obliged to institute another suit for a matter that may be then adjusted between the defendants. And, if a court of equity refused so to decree, it would be good cause of appeal by either defendant."

[*56]

The application to the present case of the doctrine laid down thus broadly and unequivocally, becomes still more apparent, when the circumstances are examined, under which the decree in *Lord Dunsany* v. *Latouche* was made. The object of that suit was, to settle the priorities of certain incumbrances upon the real estates of Warren. The Latouches, who were defendants, claimed to be incumbrancers upon Warren's estates, in respect of a judgment obtained by one Savage, which was afterwards assigned to Chamley, another defendant, and by Chamley assigned to the Latouches. The decree of the court below declared,(*e*) "that, with respect to the judgment obtained by Savage, it appearing to have been satisfied before the assignment thereof to Chamley, who paid no consideration for the same, and consented to indemnify the executors of Savage in respect thereof, such assignment was a fraud on the creditors of Warren, and ought not to charge his estate to their prejudice, and that the Latouches ought to be deemed to have had notice that the same was satisfied before the assignment thereof to them, *and that it ought not to be considered as any security to them for money advanced by them to*

(*a*) 1 Sch. & Lef. 137. (*b*) 2 Sch. & Lef. 690. (*c*) 2 Sch. & Lef. 710.
(*d*) 2 Sch. & Lef. 718. (*e*) 1 Sch. & Lef. 166.

Chamley or Warren, but that they were entitled to be satisfied by Chamley the money paid by them on the said assignment, and accordingly an account was directed of what was due to them in respect thereof, the same to be paid by Chamley." Now, when the court had declared that the Latouches had no claim upon the estates of Warren in respect of Savage's judgment, it had *decided all that the purposes of the suit required. [*57] The ulterior part of the decree, which declared that Chamley was personally liable to the Latouches for the money paid by them on the assignment of Savage's judgment, was not called for by the plaintiff, and was altogether immaterial for the purpose of ascertaining the amount and priorities of the incumbrances upon Warren's estate. But, in the present case, the validity of the deeds of October, 1799, was the main point in the colonial suit: it was a point on which all the parties were at issue, and in which Farquharson had the same interest with the plaintiffs. Since, therefore, a decree between co-defendants is conclusive as between them, even when made on a collateral matter, in respect of which the plaintiff has not asked any relief, and has not the same interest with either of the co-defendants; much more must a decree be binding as between co-defendants, when it relates to a point which constituted substantially the whole matter in issue in the cause, and on which the defendant, whom we seek to conclude by it, had the same interest with the plaintiff. If a different rule were adopted, the consequence would be, that, after one of several persons claiming under the same instrument has filed a bill to have the rights of all ascertained, and has obtained a final decree, each of the defendants may, in his turn, become plaintiff in a new suit; and thus several contradictory decrees may be made on one and the same subject.

If a bill were filed by a second mortgagee against the first mortgagee and the mortgagor, the decree would be, that the first mortgagee, upon receiving from the plaintiff or the mortgagor payment of what was due to him, should re-convey the estate, but that, in default of payment, both the plaintiff and the mortgagor should stand foreclosed. That decree *would un- [*58] questionably bind the mortgagor, though a defendant; and it can make no difference, that the colonial courts, in such cases, direct a sale, instead of decreeing a foreclosure. M'Donald and M'Nure, the plaintiffs in the colonial suit, occupied a middle place between the defendant Seton and the defendant Farquharson: by the decree of the privy council, the plaintiffs in that suit cannot touch the Dunfermline plantation, till the whole of what is due to Seton, under the deeds of 1799, is paid; and Farquharson cannot touch it, till the claims both of Seton and of those plaintiffs are fully satisfied. That decree, therefore, which beyond all question ascertains the amount of Seton's claim as against M'Donald and M'Nure and their cestuis que trust, must also ascertain it as against Farquharson. If the decree of the privy council be not binding on the mortgagor, it is possible that this court might make a decree altogether different; then, what inconvenience would follow? Seton, if

resident in the island of Grenada, would be entitled to hold the estate against all the world, until his debt of 120,000*l.* and interest were satisfied; but if he were found in England, he would be compelled to re-convey the plantation, as soon as the sum of 69,700*l.* and interest had been paid. Thus he would have, in respect of the same transaction, different and inconsistent rights as against the same parties and the same property.

The only reason for which the court requires that all persons interested shall be made parties to a suit in equity, is, "that the court may be enabled to do complete justice by deciding upon and settling the rights of all parties interested."(*a*) But how can that end be accomplished, if a defendant,
[*59] in the same interest with the plaintiff, *be not bound by the decree?

If a defendant, so situated, dislikes the frame of the plaintiff's bill, or does not choose to intrust to him the conduct of the whole case, he may, before decree, file another bill; or the court will, at the hearing, direct a cross-bill to be filed,(*b*) if such a course be deemed necessary for the purposes of justice. But he cannot stand aloof,—prepared, if the plaintiff succeeds, to take advantage of his success, and, if he fails, to raise the question anew at a future time. Being a party to the cause, he must take notice that he will be bound by the decree which shall be made in it; and if he is dissatisfied with the decree, he must get rid of it by regular proceedings.

Mr. *Agar* and Mr. *Knight*, for Farquharson:—It is true that Farquharson would have been benefitted indirectly by the success of the plaintiffs in the colonial suit. But the case stated by the present bill is substantially different from the case which was brought forward by M'Donald and M'Nure. The two suits agree in impeaching the mortgage of 1799; they do not agree in the grounds on which they impeach it.

The decree in the colonial suit would necessarily depend on the evidence which the plaintiffs in it produced against Seton; and Farquharson cannot be prejudiced by their failure to make out the case stated in their bill. It was neither incumbent on him nor possible for him to enter into evidence before the hearing against the co-defendant Seton; and it is not easy to conceive on what principle he can be concluded by the order made in a proceeding, in which the evidence, which he might have in support of his case, was not, and could not be, before the court.

[*60] *In fact, it is clear that the plaintiffs in the colonial suit, and Seton, considered the question, which was agitated in it, as a question merely between themselves: for, when Seton appealed, the plaintiffs alone were served with the petition of appeal; they were the sole respondents: Farquharson was no party to the proceedings before the privy council. It may be doubted, whether the course, which the appellant followed, was regular. If the proceedings were regular, the decree of the privy counsel does not bind Farquharson, because he was not a party to the litigation before that tribunal;

(*a*) Lord Redesdale on Pleading, 164. (*b*) Lord Redesdale on Pleading, 83.

if they were irregular, an additional reason is afforded, why the present plaintiff should not be affected by them.

Mr. *Bickersteth*, in reply:—The application for leave to appeal is made in open court, and all parties are bound to take notice of it. If a party in the cause is desirous of being a party to the appeal, he should make an application to the court for that purpose. If he does not apply to be made a party to the appeal, but leaves the conduct of the appeal to others, whose interests are the same with his own, he cannot afterwards allege that the proceedings on the appeal were, on that account, irregular.

But, for the purpose of the present question, it is immaterial whether the proceedings in the privy council were regular or not. The court of chancery has no jurisdiction to determine on the regularity of orders and decrees of supreme tribunals. If the decree, on which the defendant relies as a bar to this suit, was not duly obtained, Farquharson ought to seek relief against it by appealing in the cause, and to the court, in which the alleged irregularity occurred.

**July 25.*—THE MASTER OF THE ROLLS:—This was a bill of re- [*61] demption filed by the mortgagor against the mortgagee, praying that certain indentures, dated in October, 1799, might be declared fraudulent and void, and that the mortgage accounts might be taken upon the footing of certain other indentures dated in December, 1798.

The mortgaged estate had been the property of the mortgagee, and had been purchased of him by the plaintiff and his late partner; and the mortgage was for a part of the purchase money. The deeds of December, 1798, contained the first agreement made between the parties for the purchase and sale of the estate; the deeds of October, 1799, rescinded that agreement, and contained a new agreement for the sale and purchase of the estate, upon terms less advantageous; and the bill insisted, that such new agreement was effected by fraud and collusion between the plaintiff's late partner and the defendant.

The answer of the defendant denied all fraud, and stated that a suit had been instituted in 1803 in the island of Grenada, where the mortgaged estate was situate, by judgment creditors of the plaintiff and his late partner, praying like the present bill, that the indentures of October, 1799, should be declared fraudulent and void, and that the indentures of 1798 should be established, and that the account between the mortgagor and mortgagee should be taken upon the footing of the latter indentures, and that the equity of redemption, subject to the balance which should be found due upon those accounts, should be sold; that the plaintiff and his partner, as well as the now defendant, the mortgagee, were parties defendants to that suit, and that the plaintiff had put in an answer, supporting the case made by the bill, but *that [*62] his partner, being out of the jurisdiction, had put in no answer; that, in the month of March, 1807, the court in Grenada had made a decree accord-

ing to the prayer of the bill, avoiding the deeds of October, 1799, and establishing the deeds of December, 1798; that the defendant, the mortgagee, had appealed from that decree to the privy council, and that, in the year 1815, that appeal had been heard, and the committee of privy council had reversed the decree of the court in Grenada, and had established the deeds of October, 1799, and had directed the accounts accordingly: and the answer of the defendant insisted, that the plaintiff was bound by that decree of the privy council, and could not file a new bill here to impeach the deeds which had been established by that decree.

At the hearing of the cause, this was argued as a preliminary point: and the present plaintiff insisted, that he was not bound by this decree, inasmuch as he had not been served with the petition of appeal, nor made a party to it.

If a subsequent incumbrancer in this country files a bill for redemption of the prior incumbrancer and foreclosure of the mortgagor, who are both parties defendants, and in that suit the debt of the prior incumbrancer is established at a certain sum by the decree of the court, it cannot be argued, that the mortgagor is not bound by that decree as to the extent of the debt of the prior incumbrancer, so long as the decree remains unimpeached.[1] In the West Indies the relief given to a mortgagee is not foreclosure, but a sale of the equity of redemption; and such was the nature of the suit in Grenada.[2] But the form of relief can make no difference in the principle, that the mortgagor,—being a defendant in the suit in the same interest with the [*63] plaintiff, the *subsequent incumbrancer,—must be equally bound by the decree which establishes the amount of the debt of the first incumbrancer.

It is argued that the plaintiff in the present case was not bound by the decree of the privy council, because he was not served with the petition of appeal. I consider that it was not incumbent upon the appellant to serve him. The appeal was against a decree obtained by the plaintiff, with whom the appellant was to contest the validity of the decree: and if a defendant, in the same interest with the plaintiff, did not think proper to trust his interest to the sole conduct of the plaintiff, he should have applied to the court, and have prayed that he might be admitted as a party to support the decree, which permission would have been granted to him as of course. But if it be admitted that the plaintiff ought regularly to have been served with the petition of appeal, and could for that cause avoid the decree of the privy council, he must proceed for that purpose in the suit in which the irregularity occurred: and he is bound by the decree of the privy council, until he has obtained judgment against it in that suit.[3]

[1] Vide *Christian* v. *Field*, 2 Hare, 182.

[2] Vide *Mills* v. *Dennis*, 3 Johns. Ch. Rep. 369.

[3] All the defendants affected by a joint decree (although it may be otherwise, when the defendants have separate and distinct interests, and the decree is several and does not jointly affect all,) should be joined in the appeal; and if any of them refuse or decline, upon notice and process (in the

For these reasons, I am of opinion that the plaintiff is not at liberty to file a new bill here to impeach the validity of those deeds which the decree of the privy council has established, and that his bill must be dismissed, and dismissed with costs.[1]

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*IN THE MATTER OF QUEEN'S COLLEGE, CAMBRIDGE. [*64]

1827; Dec. 1828; Jan. 21, 22; June 22.

The statutes of Queen's College, Cambridge, direct certain elections to be made by the president and the majority of the fellows: Held, that the concurrent voice of the president is necessary in all such elections.

THE petitioners in this case were certain fellows of Queen's College, in the university of Cambridge; and the petition was addressed to the king's most excellent majesty, in his high court of chancery, as visitor of the college.

It stated that the college was founded by the Lady Margaret, consort of Henry VI., in 1446; that, by letters patent, in the twenty-sixth year of the reign of the same king, the president and fellows were created a corporation aggregate; that, in 1475, a body of statutes for the government of the college was promulgated under the auspices of Lady Elizabeth, consort of Edward IV., which were, in 1549, reformed by the commissioners of Edward VI., and subsequently in 1559, by the commissioners of Queen Elizabeth; that, by the statutes so reformed, the *thesaurarius superior*, or senior bursar, was to be elected annually by the president and major part of the resident fellows; that the 11th of October is the day on which the election of bursars and other annual college officers has usually, of late years, taken place; that on the 11th of October, 1827, the society, which may consist of a president and nineteen fellows, was composed only of the president and sixteen fellows; that, on that day, at a meeting of the president and ten fellows, (being the whole number in residence,) regularly convened, the president, Dr. Godfrey proposed Joseph Dewe, a fellow of the college, as a fit person to fill the office of thesaurarius superior; that *Dr. Godfrey and three of the [*65] fellows having voted for Dewe, and the remaining seven against him,

nature of summons and severance in a writ of error,) to become parties to the appeal, then the other defendants should be at liberty to prosecute the appeal for themselves and on their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below, as to them, be proceeded in and executed. Story, J., *Todd* v. *Daniell*, 16 Peters, 521.

[1] Vide *The Marquis of Breadalbane* v. *The Marquis of Chandos*, 2 Myl. & Cr. 732, 733, n. 2. *Clark* v. *Dew*, 1 Russ. & M. 109, and note, ibid. *Hawley* v. *Mancius*, 7 Johns. Ch. Rep. 182. *Bogardus* v. *Clark*, 4 Paige, 626. *Stiles* v. *Burch*, 5 Paige, 135. *Dows* v. *McMichael*, 6 Paige, 139. *Barrs* v. *Jackson*, 1 Yo. & Coll. C. C. 585. Am. Ch. Dig., Decree IV., Evidence IX., Judgments IV.

the president declared there was no election; that one of the petitioners then stated his desire to propose Samuel Fennell, a fellow of the college, as a fit person to fill the office of bursar, but the president declared that he would neither allow Fennell to be proposed, nor would himself propose any other person; that the interests of the college were endangered by the non-election of a bursar, who was one of its most important officers; that the concurrent voice and consent of the president of the college was not necessary in the election of a bursar, or any other election or appointment, or in concluding any other college business; and that the refusal of the president to put a just and reasonable motion at the suggestion of any of the fellows, or to allow such a motion to be put by any fellow of the college, was not warranted by any of the statutes, or any interpretation of them, though Dr. Godfrey had on former occasions, as well as on the present, exercised that power.

The prayer was that his majesty, as visitor of the college, would be pleased to cause it to be declared, that Dr. Godfrey was not authorized or justified in refusing to allow Samuel Fennell or any other properly qualified person to be proposed to the society for the office of bursar; and that the concurrent voice and consent of the president in elections, appointments, gifts, grants, and other corporate acts, was not necessary to make such election, appointment, gift, grant, or other act valid and of good effect.

The question argued was, whether it was necessary that the president should concur in the election of a bursar and in other college elections; [*66] or whether an *election would be valid, if made by a majority of the persons present having a right to vote, although the president voted with the minority?

The fiftieth chapter of the statutes given to the university by Queen Elizabeth in the twelfth year of her reign, is entitled "*De ordinationibus collegiis præscriptis*," and contains the following words:—"*In omnibus et singulis electionibus tam sociorum, discipulorum, scholarium, officiariorum, lectorum, reliquorumque membrorum cujusque collegii, quam in omnibus et singulis vacationibus et concessionibus quibuscunque, necessario requirendus est magistri sive præpositi illius collegii assensus et consensns.*"

It was contended on behalf of the president, that, under this ordinance, independently of the particular statutes of the college, no election could take place without his concurrence; more especially as several of the regulations prescribed by that chapter of the university statutes had long been and still were observed in Queen's College: and *St. John's College* v. *Todington*,(*a*) *The King* v. *The Bishop of Ely*,(*b*) *The Bishop of Ely* v. *Bently*,(*c*) *The King* v. *Catharine Hall*,(*d*) *The King* v. *The Bishop of Ely*,(*e*) *The King* v. *The Chancellor, &c. of the University of Cambridge*,(*g*) *The King* v.

(*a*) 1 Burr. 158. (*b*) 1 Wils. 266. 1 W. Blackst. 52. (*c*) 2 Bro P. C. 220. 2 Strange, 912.
(*d*) 4 T. R. 233. (*e*) 2 T. R. 290. (*g*) 6 T. R. 89.

1828.—In the matter of Queen's College, Cambridge.

The Vice-Chancellor, &c. of the University of Cambridge,(a) *Queen's College case,*(b) *The King* v. *Westwood,*(c) and the case of King's College and Eton College in 1816, were referred to.

*In the discussion, reference was also made on both sides to usage; [*67] but the evidence on this point was not very precise or distinct; and the question was mainly argued and finally decided on the words of the statutes of the college, as revised and settled by the royal commissioners in 1559.

The statutes of Queen's College, principally referred to in the argument, were the following:—

"*Statute* 3.—*De electione Præsidentis.*"

This statute, after prescribing the mode in which the president is to be elected, contains the following words:—

"In quem major pars sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur."

"*Statute* 35.—*De electione Officiariorum.*

"Quamvis præsidentem tamen omnino habere cupimus in hoc collegio, qui necessaria collegii negotia promoveat, statuta exequatur fideliter, rebusque ejusdem collegii universis recte prospiciat; tamen, quando ne unus aliquis tantæ provinciæ sufficiat, necessarium duximus, singulis annis, *ad ejus relevationem*, aliquos deputare officiarios.

"Statuimus, igitur, quod, singulis annis, in mense Septembri, *per præsidentem et majorem partem sociorum* eligantur duo thesaurarii, qui claves publici ærarii una cum præsidente custodiant.—Quorum superior omnes et singulas collegii receptiones et expensas fideliter scribet; quas singulis mensibus ostendet præsidi," &c.

"Insuper, volumus, ne quisquam thesaurariorum præsumat retinere quovis modo, ex pecuniis collegii, *post finalem computum, supra [*68] summam quadraginta solidorum, (sub pœna prædicta,) nisi de consensu præsidentis et majoris partis sociorum."

"—— Statuimus, præterea, quod omnia officia, tam domestica quam Universitatis, per præsidentem et majorem partem sociorum libere conferantur (citra ullum personarum respectum) illis sociis, quos iidem *præsidens et socii* obeundis officiis judicabunt magis idoneos. Quod si quisquam sociorum pro aliquo officio in universitate laboraverit, contra præsidentis et sociorum determinationem; vel si idem officium recipiat, etiamsi regentes vel non regentes eundem eligant ad officium aliquod; socius sic officium hujusmodi recipiens, contra præsidentis et sociorum determinationem, solvet sex libras tredecim solidos et quatuor denarios illi socio collegii nostri, qui ad officium, ex determinatione præsidentis et sociorum, fuerat eligendus."

"*Statute* 9.—*De qualitatibus eligendorum in Socios, et de electione eorundem.*

"—— Electio autem sociorum erit ad hunc modum. Præsidens et duo

(a) 3 Burr. 1656—1660. (b) Jac. 35. (c) 4 B. & C. 781, 796, 797.

seniores socii præsentium stabunt ad mensam Domini in capella collegii; et primo præsidens et dicti seniores scribant suffragia sua manibus propriis sub hac forma vel consimili, '*Ego N. eligo N. in socium hujus collegii*;' et deinde singuli socii præsentes vota sua similiter scribant singulatim:(*a*) *et in quem præsidens et major pars sociorum omnium tam præsentium quam absentium consenserint, pro electo habeatur.* Quem sic electum [*69] *præsidens teneatur pronuntiare et admittere. Quod si suffragia præsidentis et sociorum in duas vel plures partes dividantur, ita quod major pars totius numeri, ut prædicitur, in aliquem unum convenire non possit, tunc in quem præsideus et socii facientes medietatem totius numeri consenserint, pro electo habeatur absque hæsitatione vel contradictione aliqua; cujus electio per præsidentem, nomine majoris partis totius numeri, pronuncietur; nam in hoc casu semper præsidentis suffragium pro duobus suffragiis computari decernimus tenore præsentis statuti."

"*Statute* 13.—*De octo Scholaribus.*

"—— Statuimus, quod, *per consensum præsidentis et majoris partis* sociorum omnium præsentium, eligantur octo scholares ingeniosi, et indigentes, ac honestis moribus prædiți, sophistæ, vel saltem in grammatica sufficienter instructi," &c.

"*Statute* 6.—*De officio et auctoritate Præsidentis.*

"—— Ordinamus, præterea, quod præsidens, pro sua discretione, examinabit omnes billas computantium quorumcunque in hoc collegio, et in tempore computi, et aliis temporibus opportunis; allocando id quod pro suo arbitratu justum videbitur et rationabile: nisi quando per præsidentem injuste quicquam allocari ad damnum collegii visum fuerit majori parti sociorum.

"Et ne præsidens nimia turba negotiorum gravetur ordinamus, quod liceat præsidenti præcipere et mandare cuicunque de sociis ut vadat et equitet pro negotiis collegii promovendis; nec quisquam sociorum recusabit facere quod præsidens in hac parte jubebit, sub pœna quadraginta denariorum communi cistæ solvendorum, nisi rationabilis causa ipsum excuset *per* [*70] *præsidentem et *majorem partem sociorum* approbanda; et tunc per præsidentem alius deputeter in loco suo."

"*Statute* 16.—*De absentia Sociorum et Scholarium a Collegio.*

"Statuimus, quod nullus sociorum præsumat quovis modo extra collegium, in villa vel extra villam, pernoctare; nisi licentiam a præsidente, vel ejus vicem-gerente, prius petat et obtineat: quod si quis contrarium peregerit, prima vice, solvat communi cistæ tres solidos et quatuor denarios; secunda vice, viginti solidos; tertia vice, expellatur a collegio in perpetuum, ipso facto.

"Volumus, insuper, quod præsidens, vel ejus vicem-gerens, non concedat

(*a*) It was stated, that the language of this part of the statute had been altered at the last revisal of the statutes by the royal commissioners, and that the clause, as it stood previously, was in the following words:—

"Et in quem major pars totius numeri, viz præsidentis et sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur."

licentiam alicui socio se absentandi a collegio ultra sexaginta quinque dies in anno; nisi ob magnam et necessariam causam, *per præsidentem et majorem partem sociorum* approbandam. Nec alicui scholari licentia concedatur per præsidentem, vel ejus vices-gerentem, se absentandi a collegio ultra unum mensem in anno; nisi ex magna et urgenti causa, *per præsidentem et majorem partem sociorum* approbanda."

"*Statute* 31.—*De studio Sociorum.*

"—— Jurista vero civilis teneatur suo consilio, in omnibus collegii negotiis, gratis collegio subvenire, et coram quocunque judice gratis dicere pro collegio; quandocunque per præsidentem vel ejus vices-gerentem, fuerit requisitus:—sub pœna quadraginta denariorum communi cistæ solvendorum quoties deliquerit; nisi legitimam habeat excusationem, *per præsidentem et majorem partem sociorum* approbandam."

"*Statute* 30.—*De expulsione Sociorum.*"

This statute prescribes the course which is to be followed, when any fellow is guilty of certain acts of misconduct. After specifying these acts, it says,—

*"Juxta *judicium præsidentis et majoris partis sociorum* (si legi- [*71]
time coram eisdem *præsidente et sociis* convictus fuerit per testes idoneos, vel notoria evidentia facti reus inveniatur,) extunc a collegio expellatur, nisi prius facti pœnitens novam gratiamra dictis præsidente et sociis poterit invenire."

"*Statute* 37.—*De Interpretatione Statutorum.*

"Nihil tam perfecte et absolute a quoquam tradi ac statui queat, quod versutum callidumque ingenium non possit impie et perverse interpretari, atque ad sensum longe diversum trahere.

"Ideo statuimus, quod nullus hujus collegii socius, immo nec præsidens ipse, præsumat quovis modo statuta hæc nostra, vel eorum unum aliquod, juxta suum ipsius sensum torquere et interpretari: sed quicquid ambigui in aliquo prædictorum statutorum posthac occurrerit, declarari sive interpretari volumus *per præsidentem et majorem partem sociorum.* Sed tamen, quoad fieri possit, ab eisdem præsidente et sociis semper dicta statuta juxta sensum literalem et grammaticalem eorundem declarentur et interpretentur. Quas 'interpretationes' perpetuum robur, et effectum sortiri volumus, et proinde ac statuta a præsidente et sociis hujus collegii observandas fore decrevimus.

"Neque liceat præsidenti et sociis hujus collegii quovis modo sua propria auctoritate nova statuta condere, his præsentibus statutis et ordinationibus jam editis contraria et repugnantia; sub pœna incurrendi manifestum perjurium ipso facto."

In 1571 the president and fellows made a formal declaration of the construction which was to be put on the words "*Major pars sociorum,—major pars sociorum omnium,—major pars sociorum præsentium,—* [*72]
major pars sociorum omnium tam absentium quam præsentium." That declaration was in the following words:—

"Anno Domini 1571, Maii 9, per præsidentem et majorem partem sociorum totius numeri declaratum est:—quod hæc verba, ubicunque in statutis nostris occurrunt aut reperiuntur, hac in significatione et sensu sunt intelligenda: videlicet:—quod '*Major pars sociorum omnium tam absentium quam præsentium*,' significat majorem partem sociorum non totius et integræ fundationis, sed majorem partem eorum sociorum qui tunc sunt, pro tempore existunt, et habentur socii:—et quod '*Major pars sociorum*,' et '*Major pars sociorum omnium*,' significat majorem partem sociorum, qui intra academiam resident et commorantur:—et quod '*Major pars sociorum præsentium*,' significat majorem partem sociorum qui in congregationibus præsidentis et sociorum adsunt.

"Proviso, tamen, (ad evitanda quædam incommoda quæ hinc oriantur,) ne, vel in dimissione et concessionibus terrarum ac prædiorum collegii, in vendendis aut emendis terris, dominiis, prædiis, aut quibuscunque tenementis, tantum aliquid publico consensu confirmatum exeat aut concludatur, nisi præsidens, triginta diebus antea proxime ad minimum præcedentibus, majori parti sociorum tum domi præsentium significaverit, ut alios certiores faciant; quo, si velint, in id tempus domum repetant; nisi forte major pars omnium existentium sociorum secus fieri decreverit."

The petition was supported by Mr. *Joshua King*, one of the petitioners, in person.

Mr. *Garratt* and Mr. *Jacob*, contra.

[*73] *In support of the petition it was contended, that the head of a corporate body could not claim a negative voice, by which he could, at his own mere pleasure, defeat the resolutions of all the rest of his fellow corporators, unless such negative voice were given to him by the most clear and unequivocal words. The 33 H. 8, c. 27, shows, that the policy of the law is opposed to any prerogative, by which the vote of the majority may be deprived of effect. In the present case the election of a bursar is ordained to be *per præsidentem et majorem partem sociorum*. The words denote the electoral body; and an election by the majority of the body thus convened, the president being one of that body, will be a valid election.

The same question arose in the case of Clare Hall,(*a*) the statutes of

(*a*) The case of Clare Hall.

The statutes of Clare Hall, Cambridge, provide "that the election of a fellow shall be by the master and the major part of the fellows present:" Held, that a valid election might be made without the concurrent voice of the master.

The statute of Clare Hall concerning the election of fellows, is as follows:—

"Volumus etiam et statuimus per magistrum vel (ipso absente) ejus locum tenentem cunctos socios in Universitate præsentes, infra quindecim dies postquam de vacatione alicujus societatis ei constiterit commonefieri, quatenus quisque solicitam faciat inquisitionem de juvenibus quibusdam tam moribus quam eruditione magis idoneis, qui in sociorum numerum cooptentur; quorum sic repertorum nomina, simul cum nomine comitatus quo quisque fuerit oriundus, tenebuntur socii, tricessimo die post dictam admonitionem, magistro et consociis suis tunc ad hoc specialiter congregatis repetere et decla-

which provide, "that the election of a *fellow shall be by the master [*74] and the major part of the fellows present." The master insisted that no valid election could be made without his concurrent voice; *and [*75]

rare. Quo facto volumus ut magister sive ejus deputatus, infra mensem post istam nominationem et declarationem, convocet omnes socios tum in villa præsentes ad electionem secundum formam sequentem celebrandam; videlicet, quod magister et duo alii socii (senior et junior omnium sociorum tum domi præsentium) seorsim in aliquo sacelli loco stabunt, et primo nomen et cognomen eligendi vel eligendorum propriis manibus scribent, et deinde in eadem charta cæteri omnes socii similiter facient sub hac vel consimili forma 'Ego N. eligo N. in socium hujus collegii;' *et in quem magister et major pars sociorum præsentium convenerint pro electo habeatur;* quem sic electum magister vel ejus deputatus statim coram omnibus sociis pronuntiare et publicare tenetur, et eum vel eos sic electos et pronunciatos, quam primum commode fieri poterit, admittere. Si vero in electione sociorum consensus eorundem in socios eligendos æqualiter numero sint divisi, tunc poterit magister illum de dictis electis assumere ad societatem dictæ domus quem scientia et moribus ex iis crediderit meliorem. Quod si vota sociorum in socios eligendos adeo diviss, ut nullus a majori parte vel media eorum reperiatur electus, tunc iterum et si opus fuerit sæpius eligantur infra duos dies, quousque ad majorem vel mediam partem perventum fuerit sociorum qui in socium consenserint eligendum. Si vero infra duos dictos dies hujusmodi major vel media pars sociorum in sociorum non consenserint eligendum, ex tunc ad magistrum, cum duobus sociis dictæ domus sibi assidentibus, electio pertineat ea vice, ut aptum et idoneum socium sine moræ diffugio assumere non postponat."

On the 15th of May, 1787, John Bordieu was elected a fellow of Clare Hall by a majority of the fellows; but the master refused to declare him duly elected.

On the 17th of May, nine of the fellows presented their petition to the vice-chancellor; and he, by his certificate, dated on the 18th of July, declared, that he had consulted with the bishop of Llandaff and the reverend Charles Norris, his assessors, chosen by the university, and that, after an attentive consideration of the appeal, &c., they did not agree in their opinions on the question, whether John Bordieu was, on the 15th day of May, 1787, duly elected fellow of the college: wherefore he, conceiving that he had no authority as visitor of the college to pronounce any sentence without the joint concurrence of his assessors, did declare that he could not proceed to decree in the appeal.

Petitions were then presented to the Duke of Grafton, the chancellor of the university, praying that he would determine on the appeal.

The case was argued on both sides, and, on the 21st of June, 1788, the following judgment was pronounced:—

"Know now that we have consulted with Peter Calvert and William Wynn respectively, doctors of law, our assessors, chosen by the university, as the statutes of the said college direct, and, having, together with our said assessors, considered what has been laid before us by the said several parties, and carefully examined the statutes of the said college, the precedents of former elections of fellows of the said college, which have been transmitted to us by the appellants and the master respectively, and the proceedings on the election of a fellow of the said college on the 15th of May, 1787, concerning which the present appeal has been interposed, do by virtue of our authority as visitor of the said college, with the advice and consent of our said assessors, declare and determine as follows:—

First, that, no decree having been pronounced in the said appeal by the said William Elliston, the vice-chancellor, for want of agreement in opinion of him and his assessors, the proceedings which were had before the said vice-chancellor cannot be considered as a determination on the mattter of the said appeal, and that the merits and validity of the election into a fellowship of Clare Hall, made on the 15th of May, 1787, are still undecided:

Secondly, that John Bourdieu having been elected by eight fellows at the said election held on the said 15th of May, 1787, and the said master and four fellows only having voted for James Torkington, the other candidate at the said election, *the said John Bourdieu was statutably and lawfully elected;* and that the said master was and is obliged to perfect that election by admitting the said John Bourdieu into the said vacant fellowship:

And accordingly we do, with the advice and consent of our said assessors, require the said master to admit the said John Bourdieu into the said fellowship."

the chancellor of the university, assisted by two of the most eminent civilians of the day, decided that his concurrence was not necessary. [*76] The court of king's *bench must have been of the same opinion in *The King* v. *Blythe* :(*a*) for the application for a mandamus was made by Dr. Jennings, who had been elected by eight fellows, while the other candidate had the votes of six fellows and of the president; and there could have been no pretext for the application, if the concurrence of the master was necessary to a valid election. So in *Caius College*,(*b*) the elec-

(*a*) 5 Mod. 404.

(*b*) Case of Gonvilles and Caius College.

In Caius College, Cambridge, the election of a fellow is to be by the master and the major part of the fellows: Held, that an election by the major part of the persons entitled to vote in the election is valid, though the master refuses to concur with them.

In this college the statute "*de electione sociorum*," is in the following words:—

"Sed si locus alicujus socii dicti collegii quovis modo vacaverit, in futurum volumus, quod *per custodis et majoris partis sociorum* electionem concordem, per viam scrutinii, ut premittitur, infra mensem alius surrogetur; alioqui ad solum custodem provisio et ordinatio socii pertineat illa vice."

In 1617, disputes arose between the master and fellows, which, after a full hearing, were decided by the Earl of Suffolk, at that time chancellor of the university. One of the disputes related to the right claimed by the master to have a negative voice in the election of fellows; and on that point the Earl of Suffolk made the following decree:—

"That Allen shall have the place to which he *was elected by the major part of the fellowes*, although the maister deny him by his negative voyce three tymes, and after the end of the month devolved it and elected Cooke; bycause he denied him, as it seems, *upon his own negative voyce* by the space of a month, *that soe he might devolve it to himselfe* and elect alone, not *giving* any *iust cause or reason out of the statute* why Allen was not eligible: which I ye rather determine thus, bycause it agreeth with the exposition made by the *founder* Bishopp Bateman of the same statute in Trinity Hall, likewise of his owne foundacõn: and bycause there may hereafter be peace and quietnesse between the maister and the fellowes, I doe further order that the maister and fellowes shall consent, by way of pre-nomination or pre-election, that Mr. Cooke shall have the next fellowes place that shall become voyde."

In 1714, Ellys, the then master of this college, refused to admit Morrant, who had been elected by a majority of the fellows. The visitors decided in Morrant's favor.

In the course of the argument on the present occasion, it was suggested that these decisions proceeded, not on the construction of the words of the statute but on the peculiar constitution of this college, which, while it professedly gave a negative voice to the master, invested the visitors with the power of controlling his vote, if he did not exercise it with a sound discretion; and, in support of this suggestion, reference was made to the following statute of Dr. Caius:—

5. *De voce negativa custodis.*

Volumus etiam et statuimus ut magister sive custos collegii vestri in rebus ejusdem quibuscunque suffragium seu vocem habeat negativam. Id quod et majestas regia, in statutis universitatis anno Domini 1570 editis, confirmatis, et sancitis, præcepit, et venerandus pater (Bishop Bateman) voluit, cum statuat, ut omnia fiant per magistrum sive custodem et majorem sociorum partem conjunctive. Quod si aliter interpretatum est magistro et sociis aulæ S. Trinitatis de Norvico, id ad vos nihil pertinet, quod de hoc vestro collegio in eo scripto sermo non est, nec in eam interpretationem jurastis, aliquando, sed de suo proprio, S. Trinitatis videlicet. Qua autem concessa ne custos insolescat et, diversim sentiente majori sociorum parte, pro suo nutu et voluntate omnia gerat, in iis quæ nec ad honorem nec in rem collegii faciunt, volumus, ut res in controversia ad statuta nostra et venerandi patris examinetur et rescindatur. Quod si ne id quidem potest fieri per sinistram aliquorum interpretationem, ordinamus ut res ad visitatores referatur, quo discernant illi, rectiusne senserit aut erraverit

tion of a fellow is to be by the master *and the major part of the fellows; and it has been held, that an election by the major part of the persons entitled to vote in the election is valid, though the master refuses to concur with them. [*77]

*In Queen's college the election of fellows is to be by "The president and the major part of the fellows, absent as well as present:" and the statute provides that, "if the votes of the president and fellows be divided *into two or more parts, so that no one candidate has a majority of the whole number, that person shall be deemed elected, *in quem præsidens et socii facientes medietatem totius numeri consenserint*:" this election the president is to pronounce in the name of the majority of the whole number; and the reason is added, because the vote of the president is to be counted as two votes. The whole tenor of this statute shows that the president is considered merely as an individual of the electoral body. In one particular case his vote is to be counted as two votes; implying, that in every other case his vote is on the same footing with that of any fellow of the college. The election is to be declared in the name of the majority of the whole number, showing that it is the majority of the whole number who are considered as entitled to determine the result of an election. A state of things is contemplated in which the votes of the president and fellows may be divided into two parts, so that none of the candidates shall have a majority of the whole number. How could this happen, if the vote of the president was a distinct ingredient in the election, *and was not considered as blended and counted with the votes of the other electors? [*78] [*79] [*80]

custos an major sociorum pars, et prout omnium visitatorum pars major judicaverit (modo statutis venerandi patris et nostris consonet,) sic esto, redeatque qui in errore fuit.

In the statutes of Trinity Hall, as originally given, in 1352, by the founder, Bishop Bateman, the rule for the election of fellows was expressed as follows:—

"Sed si locus alicujus socii dicti collegii quovis modo vacaverit in futurum, volumus quod *per custodis et majoris partis sociorum* electionem concordem per viam scrutinii ut præmittitur infra mensem alius subrogetur; alioquin ad solum custodem provisio et ordinatio socii pertineat illa vice: Salva nobis libera potestate ordinandi et disponendi de custode et sociis præficiendis et amovendis, dum fuerimus in hac vita."

Afterwards Bishop Bateman gave an additional statute, in which he expressed himself in these words:—"Volentes nostram intentionem circa quædam statuta vestra per nos facta, in his quæ in dubium revocari poterint, declarare, ac statutis adjicere quædem nova, quæ utilia, imino vero necessaria, collegio reputamus, ad eam procedimus in hunc modum: Imprimis—quia in statuto sub titulo *de tempore electionis et forma* circa finem taliter continetur, quod si locus alicujus socii dicti collegii quovis modo vacaverit in futurum, volumus quod per custodis et majoris partis sociorum electionem concordem per viam scrutinii ut præmittitur infra mensem alius subrogetur; alioquin ad solum custodem provisio et ordinatio pertineat illa vice—præfatum articulum taliter declaramus, quod, in electione socii, custodis præsentia necessario requiratur, si debite præmonitus vel etiam expectatus, electioni voluerit interesse; non tamen quod votum suum necessario votis majoris partis conveniat sociorum; imo volumus sufficere majoris partis sociorum collegii consensum, licet custos majori parti non consenserit in electionem socii cujuscunque."

If the words *præsidens et major pors sociorum omnium tam præsentium quam absentium* be held to give the master a veto in the election of fellows, there will be great difficulty in giving a consistent meaning to the clause which follows:—"Quod si suffragia præsidentis et sociorum in duas vel plures partes dividantur, ita quod major pars totius numeri, ut prædicitur, in aliquem unum convenire non passit, tunc in quem præsidens et socii facientes medietatem totius numeri consenserint, pro electo habeatur; . . . nam in hoc casu semper præsidentis suffragium pro duobus suffragiis computari decernimus tenore præsentis statuti." That construction of the words —*præsidens et major pars*—for which the president contends, would require the entire omission of the word *præsidentis* in the following sentence—*Quod si suffragia præsidentis*, &c.; in which case the phrases "*totius numeri ut prædicitur*" and "*medietatem totius numeri*," would evidently refer to the fellows alone; and the whole passage would provide for that particular state of circumstance, in which, the number of existing fellows being even, half of them should vote with the master, and half of them against him. But the introduction of the word *præsidentis* after *suffragia* clearly and decidedly proves, that *totius numeri* in both cases refers to the whole body, including the master; and that, consequently, this clause provides for the case where the master, and those voting with him, make just half of the whole society: and the statute directs, that in that state of things the master shall have a casting vote, or rather, that the vote of the master shall be counted as two votes. This interpretation is confirmed by the practice of the college, [*81] so far as that practice can be collected from the election papers. It may be admitted that some obscurity pervades the construction of this passage, but that obscurity is removed by a reference to the statutes previously given to the college. In the *vetera statuta* of Elizabeth, consort of Edward IV., there is no form prescribed for the election of fellows; but in the reformed statutes of Edward VI. a form of election is prescribed, the same as that which occurs in the statute of Queen Elizabeth, by which the college is at present governed, except that, after detailing the mode of voting, the statute proceeds as follows:—"Et in quem major pars totius numeri, viz. præsidentis et sociorum tam præsentium quam absentium consenserit," &c. &c. If these words had not been altered by the commissioners of Queen Elizabeth, no doubt or ambiguity could have arisen; and there is no ground for supposing that they meant to introduce into the constitution of the college so important a change as is involved in giving the master a *veto*. In these very statutes of Edward VI. vacant fellowships are required to be filled up within six months after a vacancy has occurred, unless for some cause to be approved of *per præsidentem et majorem partem sociorum;* in which case the election may be deferred *juxta judicium præsidentis et majoris partem sociorum*. In other parts of these same statutes scholars are to be elected *per consensum præsidentis et majoris partis sociorum omnium tam præsenti-*

um quam absentium.(a) College officers are to be elected *per præsidentem et majorem partem sociorum.* Now if we allow a negative to be granted to the master by these expressions, we are driven to the hard necessity of believing that the framers of the statutes of *Edward VI. gave the [*82] master a *veto* in the election of scholars and college officers—nay, even in discussions respecting the sequestration of fellowships, and other minor matters; while they clearly withheld it in the most important of all corporate acts,—the election to fellowships.

In the sixth statute, the president is empowered to order any of the fellows "*ut vadat et equitet pro negotiis collegii promovendis;*" and the fellow receiving such orders is to obey, under a prescribed penalty, unless he excuses himself for a reasonable cause, "to be approved of by the president and the major part of the fellows." Could it be contended that no excuse is to be deemed valid, unless the president shall concur in approving of it? Such a construction cannot be adopted, because the effect of it would be to render altogether nugatory the appeal from the judgment of the president, which it is the express object of the statute to confer. A similar observation applies to the thirty-first statute, by which the law fellow is to plead gratis for the college before any judge, when required by the president, "*nisi legitimam habeat excusationem per præsidentem et majorem partem sociorum approbandam.*"

In *Withnell* v. *Gartham*,(b) the nomination of a schoolmaster belonged to the vicar and churchwardens of a certain parish. Mr. Justice Lawrence said, "In general it would be the understanding of a plain man, that, where a body of persons is to do an act, a majority of that body would bind the rest;" and the decision was according to that opinion. The charters of the borough of Denbigh direct, that, if any of the capital burgesses die or are removed, "it shall be lawful for *the bailiffs, aldermen, and capital [*83] burgesses for the time being, or the major part of them, *quorum unum ballivorum et unum aldermannorum duos esse volumus*, to elect another." In *Cotton* v. *Davies*,(c) the question, was, whether upon the words of the clause—*quorum unum ballivorum et unum aldermannorum duos esse volumus*,—the consent of one bailiff and one alderman was requisite to every election. It was held that the presence only of a bailiff and an alderman was requisite, but not their concurrent voice in the election. And the lord chief justice remarked, "This is like the case of the city of London, where the mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the mayor dissent."

The recorder of Ipswich may be removed for certain acts by the bailiffs burgesses, and the commonalty, or the greater part of them, of whom the

(a) In the reformed statutes of Elizabeth, the election of the scholars is to be *per consensum præsidentis et majoris partis sociorum omnium præsentium.*

(b) 6 T. R. 388. (c) 1 Strange, 53.

bailiffs shall be two: and in *The Queen* v. *The Bailiffs, &c. of Ipswich*,(a) it was determined, that, in exercising this power, the presence of the two bailiffs, but not their concurrence, was requisite. In 12 Mod.(b) Lord Holt says, "There is a great diversity between abbot and convent, and master and fellows, mayor and commonalty, &c. For in case of abbot and convent, there must be the major part and the abbot besides; and the reason is, because the abbot only acts *cum consensu* of the major part of the rest; but in case of master and fellows, &c., the master himself is but part of the acting part, and he is one of the grantors just as the rest." In *The King* v. *Windham*,(c) the question was, whether the warden of Wadham college was to be [*84] compelled to affix the seal of *the college to a document, in which he refused to concur. Lord Mansfield said, "As to the statute concerning the college seal being put, Dr. Windham contends for a negative, and that the warden must be one. The words of the statute are these,—'*Hoc etiam volo, ut solicitudine cautum sit, ut nihil sigilletur, quod non per guardianum et majorem partem sociorum mature deliberatum concordatur, et per eosdem comprobatur.*' I am clear these words do not give the warden a negative. Warden and fellows are a description of the corporation; and the expression '*per eosdem*,' without any repetition of the word '*guardianum*,' must mean the major part of the body." This opinion has received the sanction of Lord Kenyon, who, in *The King* v. *Beeston*,(d) says, "The court will compel the person, who has the custody of the corporate seal, to affix it to any act according to the vote of the majority, though against the consent of such person; as was done in the case of Wadham college."

If it be thought that Lord Mansfield attached some importance to the circumstance that the words *per eosdem* were not accompanied with any repetition of the word *guardianum*, it may be observed that similar expressions are continually found in the statutes of Queen's College. Thus in statute 22, we have *nisi ex magna necessariaque causa aliud a præsidente, et majore parte sociorum statuatur: tunc enim ad certum tempus per* eosdem *limitandum* &c. &c; and again, in statute 23, *nisi de expresso consensu præsidentis, et majoris partis sociorum*, quibus *constet*, &c. &c.

On the other hand it was argued on behalf of the president, that the [*85] case of Catharine Hall was a decisive *authority on the point. In that college, the election of fellows, is to be "*communi omnium assensu, aut saltem ex consensu magistri et majoris partis communitatis;*" and

(a) 2 Ld. Raym. 1237. 2 Salk. 434. (b) 232. (c) Cowp. 377. (d) 3 T. R. 594.

1828.—In the matter of Queen's College, Cambridge.

Lord Eldon held that no election was valid in which the master did not concur.(a)

(a) Case of CATHARINE HALL.

In Catharine Hall, Cambridge, the election of fellows is to be "*communi omnium assensu aut saltem ex consensu magistri et majoris partis communitatis:*" Held, that no election was valid, in which the master did not concur.

The following are extracts from the statutes of Catharine Hall.

Stat. 3.—"*De numero sociorum et forma electionis.*

"Temporibus vero quibus socii eligendi sunt, hanc formam subsequentem observari volumus; videlicet, quod magister et socii prædicti, habita consideratione inter se prius, et diligenti examinatione eruditionis et conversationis eorum qui eligendi sunt, communi omnium consensu, aut saltem ex consensu magistri et majoris partis communitatis, illos in dicti collegii socios eligant, quos eruditione scientia, ac morum honestate maxime abundare crediderint.

"—Si vero in hujusmodi sociorum electione contingat, sociorum vota in duas partes æqualiter esse divisa, tunc volumus, quod magister alterum eorum, qui sic per mediam partem sociorum nominati sunt, eligat et assumat, quem ipse suo judicio propter eruditionem et morum probitatem præferendum esse judicaverit.

Stat. 4.—"*Quæ in mensa observanda, et de assignatione camerarum, et de officiariis ejusdem domus.*

"Sit etiam in eodem collegio unus ex sociis, quem præfectus qui pro tempore fuerit et major pars sociorum maxime idoneum judicaverit, senescallus seu receptor collegii prædicti."

The decree of Lord Eldon, on the question which arose between the master of the college and the fellows, is dated the 15th of September, 1802, and is in the following words:—

"Having diligently perused the statutes of the said college, and fully deliberated thereupon, I do, as visitor of the said college, in right of his majesty, declare, that the election of the said Joshua Wood against the consent of the petitioner, Joseph Procter, to the office of bursar, was not a due appointment of him to that office, according to what appears to me to be the true intent and meaning of the college statutes. And I also think proper to declare that, under the eighth statute of the said college, the license of the master, or, in his absence, of the president, must be obtained, if any of the fellows wish to be absent from college; that it appears to me, from what hath been stated in the several affidavits read, that there hath been considerable neglect of the duty of residence; that absence from college hath prevailed in a degree which has a tendency to defeat all the useful purposes for which a college is founded; that it is particularly blameable in such of the fellows as hold offices in the college; and that the master was bound by the statutes to reform the practice which hath obtained, and that, in this case, it is also the clear statutable duty of the resident fellows to dine together, in general, in the hall.

"I do also declare, that the master has the right of appointing the tutors of the college, and that the dean, lecturer, and bursar, are to be appointed by the master and fellows, *the master's concurrent voice being necessary in the appointment.*

And I do further declare, that the master's consent to the admission of the said Richard John Astley (a young man admitted by the tutor, without the master's authority and consent, into the college) was necessary.

And for the purpose of explaining my judgment, as expressed in some of the declarations herein contained, and with respect to some of the matters discussed before me, and represented to be of much importance to the government of the college, I do declare that, according to what appears to me to be the true intent and meaning of these statutes, the same being interpreted by each other, and due regard being had, in the interpretation, to the substance and terms of all and each of them, and to the nature of the body to which they relate, *the concurrent voice or consent of the master of the college, present at an election*, is necessary to the election of a fellow thereof. And I also declare that, in my judgment, for the good government of the said college, the master, being present at college meetings, or the president, being present in his absence, ought to be considered as having alone the right of putting any proposition to the vote.

"And with respect to the inconvenience apprehended, if the true intent and meaning of the statutes is such as I conceive it to be, that intent and meaning cannot be sacrificed to considerations of con-

[*86] *The plain import of the words of the statutes of Queen's College with respect to the election of bursars and fellows is, that there must [*87] be two concurring *parties in the election, the president and a majority of the fellows; and no election can be sustained, unless it is made by the voices of both. The society is not thereby subjected to the arbitrary power of the president, because his voice is unavailing, unless the majority agree with him: the president, in like manner, is not placed at the mercy of the subordinate members of the society, because they cannot, without his concurrence, make any valid nomination.

[*88] *In the statutes of this college, the phrase, "*præsidens et major pars sociorum*," seems to denote not the persons constituting the assembly who are to elect, but the individuals who are to concur in the appointment or election. Thus in statute 3 *de electione præsidentis*, it is said, "*in quem major pars sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur*;" and statute 13 directs the election of scholars to be "*per consensum præsidentis et majoris partis sociorum præsentium*." In this instance, the words "*major pars*" cannot possibly denote the body of fellows present at the election and voting: they must designate the fellows concurring in the election of some one individual; and it is but fair to give them the same sense in other statutes.

The latter part of the statute concerning the election of fellows is quite consistent with the right for which the president insists. It may happen that the votes of the president and the fellows shall be divided between two or more candidates in such a manner, that, though none of the candidates has the votes of a majority of the whole number of fellows, yet one of them may have the votes of the president and of half of the fellows; and it is declared, that in such a case he who has the vote of the president and the votes of half the fellows, shall be deemed duly elected. This provision is favorable rather than adverse to the president's claim. It is in substance a declaration, that, in order to be elected a fellow, a candidate must unite the vote of the president, and the votes of at least one-half of the fellows.

No difficulty arises from the clause in the statutes, which imposes fines on a fellow omitting to do certain acts when required by the president, unless he excuses himself for a reasonable cause to be approved of by the presi- [*89] dent and the majority of the fellows. The penalty *is incurred by the refusal or omission to do the prescribed act; and the defaulting

venience. The master and president are answerable to the visitor, that all their powers shall be exercised according to their duty. There resteth also upon the consciences of the master and president a most weighty and sacred obligation—the obligation of an oath—to use the powers vested in them respectively by the statutes, so as faithfully and impartially to execute the duties which those statutes require them to discharge, always recollecting that a refusal of consent, or a refusal to put a proposition to the vote, or a refusal to act, is not warranted by the true meaning of the words of the statutes, if it rests upon an interpretation which is, as the statutes express it, "Callida et sinistra contra ipsarum ordinationum sensum et mentem," and that, in such case, it may be considered as substantially, a breach of their oath."

party cannot escape from the penalty, unless the excuse, which he assigns, be satisfactory both to the majority of the fellows and to the president. The true effect of such clauses is merely to take away from the head of the body the power of remitting penalties by his own sole authority.

In some matters, the president unquestionably has a negative; for instance, it is clear by the sixteenth statute, that a fellow cannot be absent from the college without the leave of the president or his deputy; and the statute directs that leave of absence shall not be given for more than sixty-five days in the year, "unless for some great and necessary cause to be approved of by the president and the major part of the fellows." Here the president must have a negative; because there can be no leave of absence without his consent: and it is but reasonable to give a similar construction to the same words in other parts of the statutes, more especially as the whole scope of the institutions of this college is to invest the head of the body with considerable authority and superior dignity, and he is in no instance treated as on the same footing with an ordinary fellow.

Cotton v. *Davies*, and cases of that class, have no application to the present point; for, if an election is to be by a certain number of persons, of whom A. and B. shall be two, A. and B. are obviously mere component, though necessary, parts of the electing body, by the majority of whom the election is to be made. The question here has no similarity to that which arises on the effect of a quorum clause. In *The King* v. *Windham*,(*a*) the words "*per eosdem*" seem to have been regarded as equivalent to a quorum [*90] clause, and as denoting that the warden was, for the purpose mentioned in that statute, to be considered merely as on the same footing with any other member of the corporation. *The King* v. *Blythe*(*b*) so far as the report is intelligible, is an authority rather for than against the claim of the president; for the conclusion of the report is, "That the court were also of opinion, that the master had only a negative voice in this case."

THE LORD CHANCELLOR:—This is a petition to the king in his court of chancery as visitor of Queen's College, in the University of Cambridge. The petition states, that Queen's College was founded by Margaret, the wife of Henry the Sixth; that a body of statutes was given to the college by Elizabeth, the wife of Edward the Fourth; that those statutes were afterwards reformed by commissioners appointed in the reign of Edward the Sixth; that a second revision of the statutes took place in the reign of Elizabeth; and that the statutes, so ultimately reformed, regulated, and settled, are the governing statutes of this college. It appears by these statutes, that there is an officer called senior bursar—*thesaurarius superior*; it is ordered by the statutes, that he shall be elected "*per præsidentem et majorem partem sociorum*;"

(*a*) Cowp. 377. (*b*) 5 Mod. 404.

and the question is, whether a fellow of the college can be elected to fill this office without the concurrent voice of the master.

The words of the statute are, that the officer is to be elected "*per*
[*91] *præsidentem et majorem partem sociorum.*" *The phrase "*per præsidentem et majorem partem sociorum,*" may denote the body that is to elect, or it may denote the individuals by whom the election is to be made. If it denotes the body that is to elect, this consequence will follow—that, at a meeting composed of the president, and the greater part of the fellows, and proceeding, when thus convened, to the election, a majority of the body so convened will have power to elect. Now, in the course of the argument, I have not heard it contended by Mr. King, that the election would be valid, unless the greater part of the resident fellows concurred in the election. If the greater part of the resident fellows must concur in the election, it appears to me impossible to consider that the phrase "*per præsidentem et majorem partem sociorum*" is to denote the electing body, but it must have reference to the individuals by whom the election is to be made; and, if it refers to the individuals by whom the election is to be made, then it appears to me that the president is a party whose concurrence in the election is necessary.

Thus the question stands upon the statute relating to the election of a bursar. But the greater part of the argument turned upon the construction of other statutes of the college, which were made use of for the purpose of illustrating the meaning of the particular statute in question; and, in fact, the discussion turned principally upon the construction of the statute relative to the election of fellows. It becomes material, therefore, to consider (for, after all, the election of fellows is the point of the most importance) the construction of that statute. The words are, "*Et in quem præsidens et major pars sociorum omnium tam præsentium quam absentium consenserit, pro electo habeatur: quem sic electum præsidens teneatur pronuntiare et admittere.*" Now, in reading the statute, it seems almost impossible to
[*92] *consider the words "*præsidens et major pars sociorum omnium tam præsentium quam absentium,*" as denoting the body that is to elect. It seems to point to the individuals by whom the election is to be made; and it has never been contended during the course of the argument, nor suggested with reference to the particular instances of elections which have been presented to the consideration of the court, that an election would be valid, when a smaller number than one-half of the existing body of fellows concurred in the election. It was admitted by Mr. King, who argued on behalf of the fellows of the college with much industry and talent, that the greater number of the fellows must concur in the election. It is quite impossible, therefore, to say that the words "*præsidens et major pars sociorum omnium tam præsentium quam absentium*" denote the body by whom the election is to be made as a body: for if those words denoted the body by whom the election is to be made, and not the individuals who are to concur in the election,

it would follow that, if the president assembled with the greater number of the existing fellows, and then proceeded to the election, the majority of those who were thus assembled would be sufficient to constitute a valid election. But it has been admitted, and it is clear from the subsequent part of the statute, that such an election would not be a valid and binding election, unless the persons concurring in the election constituted a majority of the whole number of existing fellows. I think, therefore, upon the words of this particular statute, that the phrase "*præsidens et major pars sociorum omnium tam præsentium quam absentium*" refers to the individuals by whom the election is to be made; and if so, it is perfectly clear, in point of construction, that the president is a necessary party concurring in the election.

*But further light is thrown upon the construction of this statute [*93] by reference to the original form of the statute before the last alteration. The statute was originally in these words, "*Et in quem major pars totius numeri, viz. præsidentis et sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur.*" It is quite clear that, according to that form of the statute, the majority of the body composed of all the existing fellows and the president added together would constitute a good election. Nothing can be clearer than the language of the statute as it stood originally; and there was no motive for, or object in, an alteration of the phraseology of the clause, unless there was an intention to make a substantial alteration with respect to the mode of election. Under the words "*Et in quem major pars totius numeri, viz. præsidentis et sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur,*" the election would be valid, if the greater part of the number so assembled concurred in it. The alteration, which was made, was in these words, "In quem præsidens et major pars sociorum omnium tam præsentium quam absentium consenserit, pro electo habeatur." It is quite obvious, that the alteration was introduced for the purpose of rendering the voice of the president necessary to the validity of the election. The construction, therefore, to which we would be led by the words of the statute as it now exists, is confirmed by a reference to its original form, and to the alteration introduced in the reign of Elizabeth.

Some ambiguity undoubtedly is thrown upon this construction by the words of the subsequent part of the clause:—"*Quod si suffragia præsidentis et sociorum in duas vel plures partes dividantur, ita quod major pars totius numeri ut prædicitur in aliquem unum* *convenire [*94] *non possit, tunc in quem præsidens et socii facientes medietatem totius numeri consenserint, pro electo habeatur absque hesitatione vel contradictione aliqua.*" These are words which were framed with reference to the statute as it originally existed, and the commissioners, at the time they made that important alteration in the former part of the clause, did not attend sufficiently to the wording of the subsequent part of it, and seem not to have

made such alterations there as would have been required by the alterations in the preceding words. But it does not appear to me that the words are inconsistent with the intention of the commissioners. The word "*prædicitur*" qualifies the words "*major pars totius numeri*," and has reference to the statute as now altered; and in the clause "*ita quod major pars totius numeri ut prædicitur in aliquem unum convenire non possit, tunc in quem præsidens et socii facientes medietatem totius numeri consenserint*"—the word "*facientes*" may, without impropriety in point of construction, be confined to the immediate antecedent, namely, the word "*socii*." These words, therefore, which the commissioners do not appear to have altered sufficiently to make them correspond with the previous part of the clause, are not so inflexible, as, in point of construction, to render it impossible for me to adopt the view, which I have mentioned, of the import of this statute. For these reasons, my opinion on the statute for the election of fellows is, that it was intended that the consent of the president should be necessary to the validity of the election.

There is a subsequent statute, which appears to me to have a material bearing on the question—I mean the statute relative to the election of scholars: "*Statuimus quod per consensum præsidentis et majoris partis sociorum omnium præsentium eligantur octo scholares ingeniosi, et*
[*95] **indigentes, ac honestis moribus prædíti, sophistæ, vel saltem in grammatica sufficienter instructi, et in diversis diœcesibus et comitatibus procreati, juxta formam 'De vitanda partialitate' superius descriptam.*" It is impossible that the words "the president and the major part of the fellows," in that particular statute, can be taken as descriptive of the body by which the election is to be made, because it is qualified by the words "*sociorum omnium præsentium.*" It must denote the individuals by whom the election is to be made; and therefore in interpreting that clause it appears to me necessary, in point of grammatical construction, to consider that the president must be a concurring party in the election of scholars.

In the last section there is a provision for the interpretation of the statutes; and it is a little singular, that the party who framed them appears to have considered that it would be almost impossible that any doubt could be entertained with respect to their construction. However, he observes, that, whatever care be taken in framing laws of this description, ingenious men may contrive perversely to throw doubts upon them. The words are remarkable with reference to this particular case, and what has taken place in it: "*Nihil tam perfecte et absolute a quoquam tradi ac statui queat, quod versutum callidumque ingenium non possit impie et perverse interpretari atque ad sensum longe diversum trahere.*" The framer of these statutes seems to have considered, that in themselves they were perfect, but still liable to be perverted by extraordinary ingenuity; and he proceeds to direct, that in all cases the statutes shall be construed according to their strict and grammatical sense. The words are, "*Quoad fieri possit, ab eisdem præsidente et sociis*

semper dicta statuta juxta sensum literalem et grammaticalem eorundem declarentur et interpretentur.". It is *satisfactory to me that [*96] the interpretation, which I put upon these statutes, is according to their literal grammatical sense, their spirit, and the intention of the party.

It is material to consider the circumstances which were brought forward in argument, independently of the words of the statute. Light was attempted to be thrown upon the subject by reference to the usage under these statutes. I have read the affidavits with great attention, and I can come to no certain conclusion with respect to the evidence of former and ancient usage. This, however, I may say, as the result of the whole, that I see nothing inconsistent with the interpretation I have put upon these statutes in the conclusions which can be drawn from these affidavits.

Cases at law have been referred to, which were considered to throw light upon this subject. One was, *The King* v. *Windham.*(*a*) That has very little bearing on the question; because the conclusion to which the court there came, appears to have turned upon the words "*per eosdem.*" Another case referred to was *The King* v. *Blythe.*(*b*) That is a case almost unintelligible in its result; but the language of the court was, that the intention of the donor was to give a negative voice to the master. If we take that to have been the decision, it confirms the exposition I have given to the statute; but I entertain some doubt, on looking to the whole report, whether such was the intention of the court.

Reference has been made to the statutes of other colleges. Among others, the statutes of Trinity *College, Dublin, were referred to. I [*97] think the case of Trinity College, Dublin, has very little application to the present question. In the case of Caius College, Cambridge, the judgment appears, on looking at the award of the Earl of Suffolk, to have been founded on the improper conduct of the master, and the improper influence by which he was actuated; and it does not appear to me that any strong inference can be drawn from that particular decision. But there are two other cases which apply closely to the present,—the cases of Clare Hall and Catharine Hall.

The words of the statutes of Clare Hall are very similar to the words on which the question arises in the present instance, though they do not correspond with them precisely; and the same question arose there with respect to the election of a fellow. Having been brought under the consideration of those persons whose duty it was to decide upon it, the matter was in the first instance referred to the Vice-Chancellor of Cambridge. Dr. Watson and another gentleman, acted as assessors of the Vice-Chancellor; they were divided in opinion, and came to no conclusion. It was afterwards referred to the Duke of Grafton as chancellor, who had as his assessors Dr. Wynne and Dr. Calvert; and they decided against that construction, which, I think, was

(*a*) Cowp. 377. (*b*) 5 Mod. 404.

the proper construction. That is, therefore, a case adverse to the construction I am adopting.

Another case came before Lord Elden in the year 1802, on the statutes of Catharine Hall. The statutes of Catharine Hall, as far as they relate to this question, are substantially the same with those of Queen's College: the words are these,—"Temporibus vero quibus socii eligendi sunt, hanc formam subsequentem observari volumus;" then the statute goes on and says,—

[*98] *"Videlicet, quod magister et socii prædicti, habita consideratione inter se prius et diligenti examinatione eruditionis et conversationis eorum qui eligendi sunt, communi omnium consensu, aut saltem *ex consensu magistri et majoris partis communitatis*, illos in dicti collegii socios eligant, quos eruditione, scientia, et morum honestate, maxime abundare crediderint;" and it proceeds next, precisely as in this case, to provide for the event of the fellows being equally divided:—"Si vero in hujusmodi sociorum electione contingat sociorum vota in duas partes equaliter esse divisa, tunc volumus quod magister alterum eorum, qui sic per mediam partem sociorum nominati sunt, eligat et assumat, quem ipse suo judicio propter eruditionem et morum probitatem præferendum esse judicaverit." Lord Eldon appears to have devoted much time and consideration to the subject; and he ultimately pronounced the following order, which I now hold in my hand: he says,—"I do declare, that, according to what appears to me to be the true intent and meaning of the statutes, the concurrent voice or consent of the master of the college, present at an election, is necessary to the election of a fellow thereof; and I also declare, that, in my judgment, for the good government of the said college, the master, being present at college meetings, or the president, being present in his absence, ought to be considered as having alone the right of putting any propositions to the vote. And, with respect to the inconvenience, if the true intent and meaning of the statutes be such as I conceive it to be, that intent and meaning cannot be sacrificed to considerations of convenience. The master and president are answerable to the visitor, that all their powers shall be exercised according to their duty." I consider that as a very strong authority on the present occasion; and although I have formed my opinion upon the perusal of the statutes—comparing one statute with another—

[*99] *considering the statutes, with respect to the election of fellows, the election of scholars, and the interpretation of the statutes as most materially throwing light on the statute which gives rise to the immediate question before the court;—I am happy, finding myself opposed by the decision of the assessors in the case of Clare Hall, to find myself supported by the decision of Lord Eldon, in the case to which I have referred.

My opinion, therefore, after the best consideration, I have been able to give to the subject is, that in Queen's College the concurrent voice of the president is necessary in all elections of this nature.

THELLUSSON v. WOODFORD. [*100]

1827; August 7. 1828; June 5, 21. 1829; January 22.

A testator having appointed three trustees, and made moderate provisions for his three sons, directed all the furniture, &c. in his mansion-house at B. to be sold, "except such parts thereof as his said trustees should think necessary to be kept for receiving any of them, or of the testator's sons who should choose to go and spend a little time there occasionally:" and he bequeathed the great bulk of his property upon trust to be accumulated, and at the end of the period of accumulation to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given. Under the direction of the court, a liberal establishment had been maintained at B. at the expense of the estate. Held,

That the privilege of residing occasionally at the mansion-house at B., and of enjoying the benefit of the establishment there, was confined to trustees and to the sons of the testator, and could not be extended to a grandson of the testator, nor to an infant great grand son who was the person presumptively entitled to a share of the property at the expiration of the period of accumulation.

That this privilege was not confined to the individuals named as trustees in the will, but extended to trustees substituted in the place of those individuals.

PETER THELLUSSON, by his will dated the 2d of April, 1796, among other things, gave to Matthew Woodford, James Stanley, and E. I. A. Woodford three hundred guineas each, as a token of acknowledgment for the trouble they would have in the execution of the trusts thereby reposed in them; and after devising certain lands and tenements to them, their heirs, and assigns, upon trust for his widow during her widowhood, he directed that, upon her death or second marriage, "they, his said trustees, or the survivors or survivor of them, and the trustees who should be appointed as thereinafter mentioned," should proceed to a sale of the property so devised to them. He next made various bequests in favor of his three sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and the other members of the family; frequently using in these dispositions of his property, the phrase "my said trustees;" and then proceeded as follows:—"I give and bequeath the remainer of my plate, after my wife hath made choice of one thousand four hundred ounces, agreeable to the power hereinbefore given to her for that purpose as aforesaid, *together with all my books, china, [*101] looking-glasses, linen, wines, and the remainder of my pictures, and all the furniture which shall be at Brodsworth at the time of my decease, except such parts thereof as my said trustees shall think necessary to be kept for the purpose of receiving any of them, or of my sons, who shall choose to go and spend a little time there occasionally, shall be sold by public auction or private contract, as my said trustees shall think proper, and that the net money arising therefrom shall compose part of the residue of my personal estate."

He then devised all his real estates in Yorkshire, and all other his real estates, to the said Matthew Woodford, James Stanley, and E. I. A. Woodford, their heirs and assigns, and bequeathed the residue of his personal estate to them, their executors, administrators, and assigns, upon trusts for accumula-

tion until the death of the survivor of his three sons, and such of their issue as should be living at his, the testator's, death, or born in due time afterwards; and he directed that, at the end of that period, one-third of the accumulated property should be conveyed to the eldest male lineal descendant of each of his three sons. Various powers subservient to the execution of the trust were conferred on "the said trustees, their heirs and assigns," or "on them, their executors, administrators, and assigns:" and there were provisos, that "the said Matthew Woodford, James Stanley, and E. I. A. Woodford, their respective heirs, executors, and administrators, and also such other trustee or trustees who should be appointed pursuant to the proviso thereinafter mentioned, and their respective heirs, executors, and administrators" should retain out of the funds in their hands, all their costs incurred in the execution of the trust; should be chargeable each only for his own
[*102] act or default; and should never permit a *larger sum than 500*l.* to remain at any one time in the hands of any private banker. Then followed a power to appoint new trustees: "which new trustees and trustee shall act in the management and execution of the trusts aforesaid, in like manner as if he or they had been originally named a trustee or trustees in this my will aforesaid." Next came a direction with respect to the presentation to a certain advowson, or any other advowson "belonging to any other estate that may hereafter be purchased by my said trustees, or the survivors or survivor of them, or any future trustees or trustee to be appointed as hereinafter mentioned," and after some intermediate dispositions the following clause occurred: "In case of the death of any one of my said three trustees in my lifetime, I hereby nominate and appoint Mr. George Hibbert of Mincing Lane, London, merchant, a trustee in the place and stead of such deceased trustee, and to whom I hereby give and devise, jointly with such surviving trustees, all the estates hereinbefore given to such first named trustees; and I also give the like power and authority to the said Geo. Hibbert to join in the nomination of new trustees, in the events hereinbefore specified, as are by this my will given to such trustee who shall so die, jointly with the said other trustees; it being my intention that, upon the death of such one trustee in my lifetime, the said George Hibbert shall become a trustee in his place and stead for the several purposes mentioned in this my will, as fully and effectually as if he had been originally named therein, and to whom, in the event aforesaid, I give the like sum of three hundred guineas, he taking upon himself the burthen of the execution of the trusts of this my will."

The testator died in 1797. Of his three sons, one died in 1808, another in 1811, and the third in 1815.

[*103] *E. I. A. Woodford survived his co-trustees, and withdrew from the trust in 1812. New trustees had from time to time been duly appointed; but the assets were managed by receivers, and not by the trustees.

By the decree made on the hearing of the cause on the 19th of February,

1801, the master was directed, in taking the account of the testator's personal estate, to distinguish the several articles of household goods and furniture, plate, linen, china, pictures, and other articles of personal property, in the testator's house at Brodsworth; and to state to the court which particulars thereof were necessary to be kept and preserved, and to remain there for the use and accommodation of Matthew Woodford and E. I. A. Woodford, the acting trustees and executors, and of Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, the three sons of the said testator, whenever they might think proper to reside in the house, under the authority and liberty given by the testator's will; and the master was to settle a proper allowance to be made for the expenses of keeping up the house and premises, for the use and accommodation of the acting trustees and executors, and the three sons of the testator, and for the necessary expenses of housekeeping, and otherwise incidental thereto.

By a report made in 1805, 286*l.* 10*s.* a year was allowed for the wages and support of servants at Brodsworth; and 15*l.* a week, for a period not exceeding twelve weeks in the year, was allowed for housekeeping. In 1810 the yearly allowance was raised to 782*l.* 11s., and a sum of 5000*l.* was, with the sanction of the court, expended in purchasing household furniture, plate, linen, &c., for the accommodation of the trustees and the sons of the testator, when resident at Brodsworth.

*The establishment had continued on this footing down to the pre- [*104]
sent time, the trustees enjoying the benefit of it, and of the shooting on the manors adjacent to the house.

Charles Thellusson, the son, spent much of his time at Brodsworth until his death in 1815; after which time the establishment had been used for the occasional accommodation of the trustees, particularly during the shooting season.

Charles Thellusson, the son of the deceased Charles Thellusson, and his infant son, who was presumptive tenant in tail of a share of the accumulated property, now presented a petition, praying that he might be at liberty to reside at the mansion at Brodsworth, and have the use of the establishment.

1827; *August* 7.—On this petition, Sir Anthony Hart, Vice-Chancellor, made an order, directing a reference to the master, to inquire whether regard being had to the allowance out of the testator's estate for the maintenance of those who resided in the mansion-house, and to the sum expended out of the testator's personal estate to furnish the house, and the orders of the court upon the subject, the testator's estate would in any and what respect be injured by permitting Charles Thellusson, with his infant son, to reside there, as was done by Charles Thellusson deceased, one of the sons of the testator; or whether it would be for the benefit of the mansion-house that they should be permitted so to reside.

Against this order the trustees appealed; and on the appeal the question

was, whether any person, except the testator's sons and the trustees,
[*105] could claim, or could *be admitted to, the privilege of occasionally residing at Brodsworth, and participating in the benefits of the establishment, which was maintained there at the expense of the estate.

Mr. *Sugden*, Mr. *Pepys*, and Mr. *Campbell*, in support of the order of the Vice-Chancellor:—On the fair construction of the words of the will, a grand son of the testator, or even a great grand son, who is presumptively tenant in tail of the property, will be included under the term "sons," as used in that clause of the will on which the question arises. Suppose that all the sons of the testator had died in his lifetime, could the trustees have excluded the grand sons from the enjoyment of this benefit? None of the present trustees were selected by the testator: they are mere strangers, who have been substituted for individuals in whom he reposed confidence: if his bounty is to be extended beyond the original trustees, to all who may successively come into their place, why should it be confined to narrower limits, when the question is, how far the members of his own family are to participate in the benefit? The court has put a liberal construction on the words of this clause of the will; and as the establishment at Brodsworth is supported, by the direction and subject to the discretion of the court, out of the funds in which the infant has a presumptive interest, it is surely competent for it also to say that he and his father shall share in the benefits of the expenditure, and that the enjoyment of it shall not be confined to the trustees exclusively.

Mr. *Bickersteth* and Mr. *Ellison*, in support of the appeal, argued, that the testator did not mean, under the term sons, to include grand sons or more remote descendants; that, upon the principle of the order made
[*106] *by the Vice-Chancellor, all the other grand children, as well as the son of Charles Thellusson, might apply to be admitted into a participation of the benefits of the establishment at Brodsworth; and that the court had no authority, in respect of its jurisdiction over the property, to admit any persons into the enjoyment of those benefits, except the classes of persons designated in the will.

The Lord Chancellor:—In this case the testator, having previously directed the trustees of his will to permit his wife to use a certain quantity of plate, proceeds in the following words:—"I give and bequeath the remainder of my plate, after my wife hath made choice of 1400 ounces, agreeable to the power hereinbefore given to her for that purpose as aforesaid, together with all my books, china, looking glasses, linen, wines, and the remainder of my pictures, and all the furniture which shall be at Brodsworth at the time of my decease, except such parts thereof as my said trustees shall think necessary to be kept for the purpose of receiving any of them or of my sons, who shall choose to go and spend a little time there occasionally, shall be sold by public auction or private contract." It has been considered that this clause was not confined to the trustees originally named, and that it extends to the trustees for the time being; but as to the other part of it, it is in terms strictly

confined to the sons; and after having looked through the will with great attention, I see no reason why I should extend it to the grand sons,[1] or any other class of persons not expressly named. I think, therefore, that the order of the Vice-Chancellor must be reversed.

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*The infant son of Charles Thellusson, the grand son, then pre- [*107] sented a petition, insisting, among other things, that only the original trustees named in the will, and the sons of the testator were entitled, under the words of the will, to reside occasionally at Brodsworth; that, upon the death of Charles Thellusson, the son, in 1815, the direction of the decree in February, 1801, with respect to the maintenance of the establishment at Brodsworth, ceased to be in operation; and, therefore, that the establishment ought now to be broken up.

Mr. *Sugden*, Mr. *Pepys*, and Mr. *Campbell*, for the petition:—The only trustees mentioned in the clause, on which the question arises, are "my said trustees;" that is to say, the three trustees whom the testator has before named: substituted trustees cannot be included, for the power to appoint new trustees occurs in a subsequent part of the will; and though such new trustees are to act in the management and execution of the trusts, in like manner as if they had been originally named trustees, yet the spending a little time at Brodsworth occasionally is not one of the trusts which are to be executed, but is a special benefit which the testator has conferred on his sons and the three trustees named in his will. In several of the clauses mention is expressly made of the trustees to be afterwards appointed, as distinguished from the three trustees; and in the clause which relates to the nomination to advowsons, he speaks first of "his said trustees," and then of any future trustees to be appointed as thereinafter mentioned. On the sound construction of the language of the will, therefore, a benefit which is given only to "his said trustees," cannot be extended to trustees substituted after the testator's death for those whom he had appointed.

*Mr. *Bickersteth* and Mr. *Ellison*, contra:—In the first part of his [*108] will, the testator, after he has empowered "his said trustees," and the trustees who should be appointed as thereinafter mentioned, to sell the premises which he had devised to his wife during her widowhood, adds, that any of his sons should be at liberty to become the purchaser at a price to be fixed by two appraisers, one named by his said trustees, and the other by the son proposing to purchase; and he further directs, that the receipt of his said trustees should be a sufficient discharge for the purchase money. In the latter passage, the phrase "said trustees" must extend to all the trustees who were to have the power of sale; that is, both to the original trustees and to trustees who should be substituted afterwards. Throughout the will, the phrase "said trustees" is used in making dispositions and conferring powers; and it

[1] Vide *Hewitt* v. *Lord Dacre*, 2 Keen, 632, 631, and note, ibid.

is clear that the testator meant the property to be vested in, and the powers to be exercised by, all such persons as should be clothed with the character of trustees.

In fact, the question has already been decided by the court. The orders made in 1810 and 1812 proceeded on the supposition that substituted trustees, as well as the trustees originally named, were entitled to share in the advantage of the establishment at Brodsworth. In 1820, the cause was heard on further directions before the Vice-Chancellor: at that time not one of the sons of the testator, or of the original trustees, was alive; the substituted trustees were the only persons who could claim to participate in this particular benefit; and the court must have deemed their claim well founded, since it neither lessened nor broke up the establishment.

[*109] *Mr. *Sugden*, in reply:—Neither in 1810, nor in 1812, nor in 1820, was the attention of the court called to the question now raised. At the two former periods there were persons who were entitled to enjoy the privilege of residing in the mansion house at Brodsworth; and in 1820 it was assumed that there were persons so entitled. All estates and powers, necessary for the due execution of the trusts, will extend to the substituted as well as to the original trustees, either because such estates and powers are given to the original trustees, their heirs, executors, administrators and assigns,—which latter phrase will include substituted trustees,—or because the powers conferred on the original trustees are, by express words or manifest implication, extended to their successors.

The Lord Chancellor:—The question is, whether the privilege of residing in the dwelling house at Brodsworth is confined to the trustees named in the will and originally appointed, or whether it extended to the trustees who might afterwards be appointed under the power given for that purpose in the will. The expression in the clause is "my said trustees." In those parts of the will which precede this clause, the trustees of both descriptions are repeatedly mentioned, both the trustees originally appointed and the trustees to be thereafter appointed; and in one of those clauses the expression "the said trustees" is made distinctly to embrace both classes of trustees. I see, therefore, nothing in the expression contained in the clause in question to lead me to the conclusion, that it was not intended to apply to the future trustees.

If these words, then, are sufficiently extensive to embrace the future trustees, it is material to consider what was the apparent intention of the

[*110] testator. Three trustees *are originally named; and there is a power given, in the event of the death of any one of the trustees, or of any of the trustees not thinking proper to act, to appoint another trustee in his place. Under such circumstances, it would be singular to suppose that the testator should have intended that the privilege of residing in this dwelling house should be confined to the trustees originally named, and should not be extended

to another trustee appointed for the purpose of supplying the place of a trustee who was dead, or who declined to act. It is also remarkable, that in the very last clause of the will, there is a provision for appointing Mr. George Hibbert to be a trustee, in the event of any one of the before-mentioned trustees dying during the lifetime of the testator; and there is in that clause a stipulation that he should receive three hundred guineas as a remuneration for his services, thereby intimating most distinctly that the testator intended that he should be placed on precisely the same footing as the other trustees who are named. Now, it would be extraordinary, if the testator, having thus distinctly expressed his intention to place Mr. George Hibbert, under the circumstances I have stated, on the same footing with the other trustees, should not have intended that Mr. George Hibbert should participate in the advantage of residing in this mansion. It is important, likewise, to consider one of the probable objects which the testator had in view; which was, that it might be material for the interests of the estate that the trustees should occasionally reside in the dwelling house, for the purpose of more conveniently superintending the property, which was of a very extensive description.

Under these circumstances, if this question had come before the court for the first time, I should be of opinion, that all the trustees were meant to be included *in this clause. This question, however, has been before the court indirectly, or I might almost say directly, on three distinct occasions. In the year 1810, this construction was adopted in the order then made; in another order, confirming the master's report, in the year 1812, this construction was acted on; and in a third order, in the year 1820, it was again acted on by the present Master of the Rolls, then sitting as Vice-Chancellor. I see no reason whatever to depart from the construction which has been thus put on the clause. At the same time, looking at the will of the testator, it appears to me that the establishment at Brodsworth is an establishment of a character much more extensive than the testator contemplated: and as circumstances are now altered, it is not unreasonable that it should be referred to the master to inquire what would be a proper establishment to keep up for the purpose of giving full effect to the direction in the will. [*111]

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*Simon v. Barber. [*112]

Rolls.—1828; July 29.

A legacy was given to the Guernsey hospital: there were two hospitals in Guernsey, and the master reported that he could not find which hospital was intended. It was held, that the legacy was not void for uncertainty, but was well given to a charitable purpose.

The testator, Edward Simon, by a codicil to his will, gave to "the treasurer, governor, or directors of the Guernsey hospital, for the time being, the

sum of 200*l.* stock, three per cent. bank annuities, to be applied towards carrying on the charitable designs of the said corporation."

It appeared by the master's report, that, at the date of the codicil, and at the time of the testator's death, there were two hospitals in the island of Guernsey, one called the Town Hospital, and the other the Country Hospital. These hospitals are still in existence.

On the hearing of the cause, it was referred to the master to inquire, whether any and what hospital was meant or intended by the testator.

The master reported that he did not find that any hospital in particular was meant or intended by the testator.

Upon the petition of the residuary legatee, the question now was, whether the gift in question was or was not void for uncertainty.

For the attorney general, the case of *Mills* v. *Farmer*(*a*) was relied upon as establishing that the legacy was a general gift to charity, which the court would execute.

Mr. *Wray*, in support of the charitable bequest.

[*113] *Mr. *Roupell* and Mr. *Richards*, contra.

Mr. *Garratt*, for formal parties.

The Master of the Rolls:—Cases of charity rest upon peculiar principles, which do not apply to gifts to individuals. Here the testator devotes a certain sum to a charitable purpose; but he has not so described the particular purpose that it can be ascertained. This part of his property, however, being devoted to charity, it is the duty of the court to direct that it be so applied.[1]

Hayter *v.* Trego.

Rolls.—1828; June, 17. 1830; March 4.

Where a testator gives a legacy to a voluntary society which exists at his death, but is dissolved before his assets can be administered, the court will execute his intention *cy-pres*.

Thomas Hodson, by his will, dated in June, 1819, gave a legacy of 500*l.* to a voluntary society called "The Plymouth and Devonshire Asylum for the reception of Female Penitents."

The testator died in June, 1821, at which time the asylum was still in existence; but, on the 29th of May, 1822, long before the assets could be administered, the society was dissolved, the charitable establishment was completely broken up, and the furniture and other property belonging to it were sold.

The question in the cause was, whether this sum of 500*l.* was to be applied

(*a*) 1 Mer. 55.

[1] Vide the next case.

to a charitable purpose by the crown under the sign manual, or was to be administered by the court *cy-pres*.

Mr. *Pemberton*, for the plaintiffs. [*114]

Mr. *Girdlestone* and Mr. *Whitmarsh*, for some of the defendants.

Mr. *Swann*, for the attorney general:—On behalf of the attorney general it was argued, that, if the particular charitable purpose selected by the testator had failed, the disposition of the property belonged to the crown, and not to the court. *Moggridge* v. *Thackwell*.(*a*) This would clearly have been the case, if the particular charity mentioned in the will had ceased to exist in the lifetime of the testator; for, in that state of things, the money would have been devoted to charity generally, without any existing object having been selected; and whether the selected charity ceases to exist in the testator's lifetime or after his death, seems to be immaterial. "It being established," says Lord Eldon,(*b*) "that, where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case, in which, by matter *ex post facto*, the gift stands before the court, in consequence of that accident, as if it had been originally given indefinitely without any means for carrying it into execution prescribed."

On the other hand, it was contended, that here a particular charity was selected, and a trust had been created, which gave the court jurisdiction: that trust still subsisted, and thongh it could no longer be executed in the very mode and form which the testator had contemplated, the court would carry it into effect *cy-pres*. "The general principle," said Lord El- [*115] don,(*c*) "thought most reconcilable to the cases is, that, where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust."

The Master of the Rolls:—The testator here having marked out the particular nature of the charity to which he wished this legacy to be applied, the court will execute his intention *cy-pres*; and the master must settle a scheme having regard to the testator's will.[1]

(*a*) 7 Ves. jun. 78—84. (*b*) 7 Ves. jun. 83. (*c*) 7 Ves. jun. 86.

[1] A testator bequeathed £1000 to the "Jews' poor, Mile End;" there were two charitable institutions for poor Jews at Mile End, and it not appearing which of the charities was meant, it was held that the fund ought to be applied *cy-pres*; and the court divided the bequest between these two charitable institutions. *Bennett* v. *Hayter*, 2 Beav. 81. The reporter appends the following note to the case just cited: "His Lordship [Lord Langdale, M. R.] acted similarly with respect to some of the other charities; and on further directions, the legacy to 'the preachers in the Baptist persuasion,' was given in the following proportions, namely, one-fourth to 'the general Baptist fund,' and the remaining three-fourths to 'the particular Baptist fund,' as being the proportions corresponding with the relative number of preachers or ministers in each of such denominations of Baptists; and the legacy to the 'Quakers' preachers,' was given to the 'meeting for sufferings' of the Quakers." As to the

[*116] *HOUSTON *v.* HUGHES.

1827; November 15, 16. 1828; December 4.

Construction of will.

Implication of estates tail.

A testator, in a very ungrammatical and obscure will, devised real and personal property so as to vest the whole legal interest in trustees, in trust for A. and B., during their lives, to their separate use; some unfinished and unconnected portions of sentences succeeded, and these were followed by a direction, that, after the decease of A. and B, and failure of their male issue, the property should go to the grand daughters: A. and B. had each only one child, a daughter, and both these daughters were mentioned in the will: Held, upon the whole context of the will, that A. and B. were only tenants for life, and that an estate in tail male was not to be raised in them by implication.

THE question in this cause arose upon the will of Henry Lambert, bearing date the 26th of September, 1811, and executed and attested in the manner required by law for devising freehold estates of inheritance. The instrument was wholly in the testator's own handwriting, and was in the following words:—

"First, I will and direct that all my just debts, funeral and testamentary expenses be fully paid and satisfied: I give and devise bequeath unto Abraham Robarts, of Lombarts street, Esquire, in the city of London, banker, and unto Henry Hughes, of Newport street, in the city of Worcester, and unto John Platt, Bridge street, in the city of Worcester, and to their heirs forever, all my messuages or tenements, farms, lands, hereditaments, estates and premises whatsoever or wheresoever, freehold, copyhold, or leasehold (having surrendered my copyhold estate to the use of my said will,) in possession, reversion, remainder, or expectancy, or whereof I have a disposing power, with their several and respective members, rights, and appurtenances, to have and to hold such of my said hereditaments and premises as are freehold unto the said Abraham Robarts, Henry Hughes, John Platt, their heirs and assigns; to have and hold my copyhold, and all such other of my estates as are less than

principles on which the court proceeds in the application of a charity fund *cy-pres*, see *The Attorney General* v. *The Ironmongers' Company*, 2 Beav. 313, where Lord Langdale, M. R. remarks: "Where a fund is to be disposed of *cy-pres*, the court, for the sake of making a disposition, is bound to act upon the suggestions which are before it, however remote, and it is rather astute in ascertaining some application in conformity more or less with the intention of the testator. The case, however, is different where there are other charitable purposes mentioned in the testator's will itself, and in which a comparison may be instituted between the probability of the testator resorting to something very remote from his original intention, and something far less remote from the other objects which are specifically mentioned in the will. I quite agree with the view which has been taken upon the subject in the argument,—that if it could have been found that there was a clear and close approximation to any purpose analagous to the first, that the master ought to have preferred it to the second and third, distinctly mentioned in the will; but if such approximation were so remote that there would be very great difficulty in making out the similarity, and it appeared probable that if the subject had been in the contemplation of the testator he would have preferred the other two objects mentioned in his will, then, I think, it became the duty of the master to look to those second objects and lay aside the first." Ibid, p. 324, 325.

freehold, unto Abraham Robarts, Henry Hughes, John Platt for and during all my right, title, and estate term therein or thereto respectively, according to the nature and quality of the said estate *respectively: I [*117] likewise give and bequeath to Abraham Robarts, Henry Hughes, John Platt all my ready money, securities for money, household and other goods, plate, china, linen, cattle, chattels, and all other my personal estate, of what nature or kind soever, as, and for, and to the end that my trustees alone may have full power and clear and absolute authority to release, convey, assign, and assure all and every the estates and premises which, at the time of making and of executing this my will and at my death, may be vested in me, as mortgagee in fee, or as trustee, without calling upon my heir-at-law to concur or join in any release or transfer of any such premises, or have any affirmation concerning what belong to my real or personal estate whatsoever: and I do give and devise all my estates, title, and interest in and to such premises as last mentioned, together with all benefit and advantages thereof, to Abraham Robarts, Henry Hughes, John Platt, in trust and confidence that the shall hold all my lands, tenements, real and personal estates, for the uses hereinafter mentioned: I give Abraham Robarts, Henry Hughes, John Platt, on condition that they undertake and execute the office of trustees, also the several trusts therein this my will contained, 200*l.* a piece to each, but only to such of them who shall prove my said will; and that all the charges and expenses of my said trustees herein mentioned in this trust shall be paid out of my personal estate, and that if any or either my trustees die or refuse to act in the trust, that then my other trustee or my trustees shall have a power of choosing a trustee in the place of such trustee or trustee so dying or refusing to act, and so as often as the same do happen, to the intent of keeping a sufficient number of acting trustees, and that the trust may not descend to the heirs of the survivors; and my will is, that the said trustee or trustee so chosen shall have the same power and estate as given to the *trustees herein named. I give to my niece, Mrs. Sheen Hough- [*118] ton, formerly of Grafton street, in the city of Dublin, and the eldest daughter of my sister, Mrs. Ruth Leay, three hundred pounds a piece each upon their respitive marriage of each of her grand children, with the consent of their mother, or when they attain the age of twenty-one years; and if any die, their share to be equally divided between her mail and famail sons and daughters; and I give to Miss Eliza Griffith, the daughter of Miss Charlotta Griffith, late of Grafton street, in the city of Dublin, in the kingdom of Ireland, five hundred on her respective marriage, with her mother consent, or when she attains the age of twenty-one years; and I give to Miss Eleanor Kelly, of the custom house, 500*l.*; and I give to Miss Susan Kelly, 200*l.*; and I give to Mr. Henry Hughes, of Worcester, Newport street, 300*l.*: and in trust and confidence that my trustees shall hold all my lands, tenements, real and personal property, of what kind or nature soever, and all my estates and interests in the same, to be holden by my trustees in trust, and then apply the

income and annual amount of such property to the use of my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, for their lives and proper use and benefit, and after their decease, to such child, or, if more than one, to the use of such children, in manner following, (to wit):—if male issue of my niece Mrs. Sheen Houghton daughter Mrs. Strong, then I give and devise to my trustees, Abraham Robarts, Henry Hughes, John Platt, that they shall hold all my lands in trust and confidence, that the shall hold my will is whatsoever of my real estate or personal estate and interest therein come to my two nieces, by vertue of this my will, be for their own sole and separate use, and not subject to the disposal of any husband, nor to set, let, or assignee any part of the premises thereof; and that, upon the payment of money that arise [*119] from *my real or personal property, of what nature soever, that Elizabeth Sheen Houghton or Charlotta Griffith their receipt only shall be a discharge for the money received. Then, from and after the decease of my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, and failure of their mail issue, and satisfying my before mentioned gifts and bequeth, my trustees shall hold, in trust for the use of Elizabeth Sheen Houghton and Charlotta Griffith, my two nieces, their grand daughters, when the attain the age of twenty-one years, or be married, with the approbation and consent of their mother and my trustees; and not having such approbation and consent, their share to be divided among the remainder, and as my two nieces, by their will or deed in writting, shall direct or appointment, then to the use of such child or children, and the profits arising from my real and personal estates, of what nature or kind soever, shall accumulate and be layd out and invest the same in stock or public funds, or real or government security, at interest, and the produse thereupon due, or to become due, and securitys in which the same shall be then invested, amongs all and every the child and children of my said two nieces, Mrs. Sheen Houghton and Mrs. Charlotta Griffith; and my meaning is, that if Miss Eliza Griffith married and have issue, that Eliza Griffith and her children share in this my bequeathment equaly with Mrs. Sheen Houghton, but not till after the decease of my two nieces: and if this happen, my trustees, allowing what they shall judg proper for their maintenance and education of such child or children, till the arrive at the age before mentioned; and my will is, that every such child who shall take my estate by vertue of this my will, shall take my sarname, without the addition of any other sarname, and shall inhabit the Barton [*120] House, and make it their residence and place of aboad: Also I *give and bequeath to my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, all my plate, linen, china, household furniture of what nature kind soever, as well in or about my dwelling house at the Barton or elsewhere, upon trust, during their natural lives, the use and enjoyment of all such, and after their decease to the use of such son or sons and daughters as my will directs, as shall from time to time come into the possession of my estates, and inhabit the Barton House; and also as often, and from time to

time, renew the Barton lease, which is every seventh year; and also, as often as the live do fall in the lease of Colwall Park, that it be renewed, and three live keept up to preserve it; and that all the building be kept in repair, and what is expended in needful repairs to be paid out of the rent and profits of the estate. And my will is, that whatsoever of my personal estate that comes to my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, of my plate, linen, household goods, and furniture of any kind, in my dwelling at the Barton, shall remain, and after their decease, to be for the use of such child, sons or daughters, that comes to the possession of my estate by virtue of this my will: but in case of failure of issue mail, I devise to the femail grand daughters of Elizabeth Sheen Houghton and Charlotta Griffith, grand daughters, then my will that my trustees shall hold in trust all my lands, tenements, real and personal estates, after satisfying the before mentioned gifts and bequeths, in trust for the use of such grand daughters of Elizabeth Sheen Houghton and Charlotta Griffith as are then living as tenants in common, and not as joint tenants; and if this happens, and any dispute to cause a difference of the bequeaths of this my will, I direct that my said trustees do adiust my bequeath, and determine absolute the same; and those that reject my bequeat be void, and their so avoidable and divided equally *between such daughters as then living; and I do appoint my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, executrix of this my last will and testament." [*121]

The testator, at the date of his will, and up to the time of his death, was seized of divers freehold and copyhold lands in fee, and held other lands, freehold and copyhold, upon leases for lives, and for terms of years. The copyholds had been surrendered to the use of his will. The personal property amounted to about 70,000*l.*

The testator died on the 25th of March, 1814, leaving his only child, Lady Tempest, his heiress-at law, customary heiress, and sole next of kin. The plaintiffs, Mrs. Houston and Mrs. Griffith, who were the only surviving children of his sister Ruth Lea, and were designated in the will as Mrs. Sheen Houghton and Charlotte Griffith, proved his will. At the date of the will, and at the death of the testator, Mrs. Houston had only one child, Mrs. Strong, who had no son, but had daughters living at the date of the will and at the death of the testator, and afterwards, had two other daughters. Mrs. Griffith in like manner had only one daughter, Eliza, who was unmarried at the date of the will, but shortly afterwards, married Mr. Peyton, and had one daughter in the testator's lifetime, and, after his death, had both sons and daughters.

In 1811, Mrs. Strong was about twenty-four years of age, and Eliza Griffith about twenty-one. None of the children of Mrs. Strong or Mrs. Peyton had as yet attained the age of twenty-one, or married.

In July, 1821, Lady Tempest died, having made a will, which was not executed so as to operate on freehold estates, and leaving Mrs. Houston and Mrs. Griffith *co-heiresses at law, and Mrs. Houston customary [*122]

heiress both of her and of the testator. In 1825, Lessingham obtained letters of administration to Lady Tempest, with her will annexed.

The bill was filed by Mrs. Houston and Mrs. Hughes, against the trustees, the children of Mrs. Strong, Mr. and Mrs. Peyton and their children, and the administrator of Lady Tempest, praying that the rights of the parties under the will might be ascertained, and that the plaintiffs might be declared to be entitled to all the lands of which the testator died seized in fee, as tenants in common in tail male, and to his leaseholds, and the residue of his personal estate, absolutely in equal moieties.

At the hearing of the cause, on the 5th of July, 1826, before Lord Gifford, Master of the Rolls, a case was ordered to be made for the opinion of the court of king's bench. The questions proposed by the case were, first, what estate and interest in the fee simple lands and leaseholds for lives was taken by the trustees; secondly, what by the plaintiffs, Mrs. Houston and Mrs. Griffith; thirdly, what by the sons of Mrs. Peyton; fourthly, what by Mrs. Peyton and her daughters and the daughters of Mrs. Strong; and, fifthly, if the court should be of opinion that the legal fee in the lands of inheritance, and the absolute interest in the leaseholds for lives were vested in the trustees, then, in case they had been merely devisees to uses, and the legal estate had not remained in them, what estates and interest would have been taken respectively by the persons enumerated in the three preceding questions.

The case was argued before the three puisne judges of the court of
[*123] king's bench, who returned the following *certificate(*a*):—"This case has been argued before us by counsel. We have considered it, and are of opinion, that the said Abraham Robarts, Henry Hughes, and John Platt took, under the will of the testator, an estate in fee simple in the freehold and copyhold lands and hereditaments in which the said testator had, at the time of his death, an estate of inheritance to him and his heirs; and we are of opinion that the same Abraham Roberts, Henry Hughes, and John Platt took the whole interest which the testator, at the time of his death, had in the lands and tenements which were then held by him on leases for the lives of the persons in the leases in that behalf named: and, as we are of this opinion, the interests of the other parties mentioned in these questions are equitable interests only, and we have not given any opinion as to them.

J. Bayley.
G. S. Holroyd.
J. Littledale.

On the report of the master, finding the facts which had been stated in the case, and on the certificate, the cause came on to be heard for further directions.

1827; *November* 15.—Mr. *Sugden* and Mr. *J. Russell*, for the plaintiffs:—

(*a*) The argument in the king's bench is reported in 6 Barnewall and Cresswell, 403.

An estate for life is expressly given to the plaintiffs, which is followed by a limitation over, after failure of their issue male, to grand daughters; and there are no words of devise to any persons, as purchasers, other than the plaintiffs, which would include all their issue male. They therefore say, that, by the rule of legal interpretation, which has guided the construction of wills for two centuries, and which, if sometimes the *inferior courts [*124] have deviated from it, has always been adhered to by the house of lords, they take, by implication, an estate tail in tail male in the freehold and copyhold lands, and a *quasi* estate in tail male in the personalty.

The rule of construction, applicable alike to legal and equitable estates, is that, if there is a devise to A. B. indefinitely, or to A. B. for life, followed in the same instrument by words which direct that, upon the failure of A's. issue, the lands shall go over to C. D., and there are no other limitations which would include all the issue of A; there A. B. shall take an estate tail by necessary implication. The rule has been applied to various modes of expression, indicating a general failure of issue, or a failure of a particular class of issue; such as "if A. die without issue,—if A. die without leaving issue,—in default of A.'s issue,—for want of A.'s issue,—if A. dies before he has any issue of his body," &c. The principle upon which the courts have proceeded is, that, as the gift over is not to take effect till the failure of A.'s issue, the testator must have intended the estate to go in such a line of devolution as would include all the issue of A.; and, in order to promote this general intention, not expressly declared in the will, but inferred from the mere terms of the limitation over, an estate tail in A. is raised by implication. In many of the cases, the effect of the implication, by giving to A. such an estate as enables him to acquire the absolute dominion over the property, has been to render the greater part of the clause nugatory; as where the estate of A. has been expressly confined to a life interest; or where the life estate was followed by a power of appointment, or by a limitation to the heirs of his body, as tenants in common, or by other limitations precedent to the gift over upon failure of his issue. But even in such cases the rule has been uniformly adhered to; and rather than deviate from *or infringe on it, plain words [*125] have been disregarded, and whole classes of estates and interests annihilated.

The only instances in which it may seem not to have been followed, are cases which, in fact, did not fall within it, and to which its principle was not applicable; as where there was no express estate given to the persons on the failure of whose issue the limitation over was made to depend; or where the limitation over was expectant not upon a general failure of his issue, or a class of his issue, but upon a failure of that issue or class of issue at a particular time; or upon the failure only of such issue or class of issue as would be included in the express gifts contained in the will.

The rule is laid down or explained, and its predominant influence in the construction of wills is affirmed and recognised, in the judgment of Lord Hale

in *King* v. *Melling*,(a) and a great variety of other cases:(b) *Jesson* v. *Wright*,(c) *Doe* v. *Applin*,(d) *Hodges* v. *Middleton*,(e) *Wight* v. *Leigh*,(g) *Doe dem. Candler* v. *Smith*,(h) *Frank* v. *Stovin*,(i) *Robinson* v. *Robinson*,(k) *Kinge* v. *Remball*,(l) *Bacon* v. *Hill*,(m) *Milliner* v. *Robinson*,(n) *Newton* v. *Bernardine*,(o) *Langley* v. *Baldwin*,(p) *Wylde* v. *Lewis*,(q) *Southby* v. *Stonehouse*,(r) *Doe* v. *Cooper*,(s) *Doe* v. *Goldsmith*,(t) *Bennett* v. *The Earl of Tankerville*.(u)

[*126] *Does then, the rule apply to the limitations contained in this will? Ths whole property is vested absolutely in trustees; and the first bequests are merely of legacies to the grand children of Mrs. Houston, to the daughter of Mrs. Griffiths, and to a Miss Kelly. The enjoyment is then given to the plaintiffs for their lives; and, after an imperfect clause, alluding to children and male issue, and some superfluous and unconnected words repeating the devise to trustees, there is a declaration that the interests, which the plaintiffs take under the will, shall be to their separate use. This declaration, with the words of devise preceding it,—"then I give and devise to my trustees, Abraham Robarts, Henry Hughes, John Platt, that they shall hold all my lands, in trust and confidence, that the shall hold my will is whatsoever of my real estate, or personal estate, and interest therein, come to my two nieces, by virtue of this my will, be for their own sole and separate use, and not subject to the disposal of any husband, nor to set, let, assignee any part of the premises thereof, and that, upon the payment of money that arise from my real or personal property, of what nature soever, that Elizabeth Sheen Houghton or Charlotta Griffith, their receipt only shall be a discharge for the money received,"—ought to be read in a parenthesis. Omitting this parenthetical clause, the first dispositions made by the will are in the following words:—"In trust and confidence that my trustees shall hold all my lands, tenements, real and personal property of what nature or kind soever, and all my estates and interest in the same, to be holden by my trustees in trust, and then apply the income and annual amount of such property to the use of my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, for their lives and proper use and benefit; and after their death, to such child, or, if more than one, to the use of such children, in manner following; (to wit,) if male

[*127] issue of my niece Mrs. *Sheen Houghton, daughter Mrs. Strong; then, from and after the decease of my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, and failure of their male issue, and satisfying my before-mentioned gifts and bequeth, my trustees shall hold, in trust

(a) 1 Vent. 228, 229. (b) 1 Anderson, 44, pl. 110. (c) 2 Bligh, 1.
(d) 4 T. Rep. 82. (e) Douglas, 431. (g) 15 Vesey, 564.
(h) 7 T. R. 531. (i) 3 East, 548. (k) 1 Burr. 38. 2 Ves. sen. 225.
(l) Cro. Jac. 448. 8 Vin. Ab. 211. pl. 7, 8. (m) Moore, 464, pl. 656. 8 Vin. Ab. 240. pl. 4.
(n) Moore, 682, pl, 939, 8 Vin. Ab. 240, pl. 7. (o) Moore, 127, pl. 275. 8 Vin. Ab. 264, pl. 2.
(p) Cited in 1 P. Wms. 759. (q) 1 Atk. 432. (r) 2 Ves. sen. 612.
(s) 1 East, 229. (t) 7 Taunt. 209. (u) 19 Ves. 170.

for the use of Elizabeth Sheen Houghton and Charlotta Griffith, my two nieces, their grand daughters," &c. Here is a clear gift of an estate for life to the plaintiffs, followed by a limitation to their grand daughters, on failure of their male issue, but without any express gift to their male issue. An estate in tail male must, therefore, be raised by necessary implication, in Mrs. Houston and Mrs. Griffith.

This construction cannot be affected by the intervention of the imperfect words "and after their decease, to such child, or, if more than one, to the use of such children, in manner following; (to wit,) if male issue of my niece Mrs. Sheen Houghton." The utmost that can be inferred from these expressions is, that the testator was contemplating the event of there being certain children, but of whom does not clearly appear, and the possibility of Mrs. Houston or her daughter having male issue.

The clauses which immediately follow relate to the interests given to the grand daughters on failure of issue male. Next comes a direction, that "every such child," who shall take the estate by virtue of the will, shall assume the testator's surname, and inhabit the Barton House; and then there is a bequest of the plate, linen, furniture, &c. in the Barton House to the plaintiffs, for their life, and after their decease, "to be for the use of such child, sons or daughters, that comes to the possession of my estate by virtue of this my will." There is nothing in any of these clauses incompatible with an estate tail in the plaintiffs; on the contrary, they accord *better with the line of devolution which would take place under an [*128] estate in tail male than with the course of enjoyment which would arise under any other construction. The testator proceeds: "But, in case of failure of issue male, I devise to the femail grand daughters of Elizabeth Sheen Houghton and Charlotta Griffith grand daughters, then my will is, that my trustees shall hold in trust all my lands, tenements, real and personal estates, after satisfying the before mentioned gifts and bequeths, in trust for the use of such grand daughters of Elizabeth Sheen Houghton and Charlotta Griffith as are then living as tenants in common, and not as joint tenants." In case of failure of whose issue male? Why, of the issue male of the ladies who have been spoken of immediately before, and whose names occur again, at the distance of two or three words, in this very clause;—the same failure of issue male which has been mentioned before in express terms —failure of issue male of Mrs. Houston and Mrs. Griffith. This concluding devise is merely a repetition of the former devise to the grand daughters, after failure of issue male of the two nieces, to whom a life estate is given.

By force, therefore, of the rule of legal construction, as applied to the clear words of this will, the plaintiffs take an estate in tail male in the lands; and the application of the rule is here free from many of the difficulties which has surrounded some of the cases. We do not disregard any clear words,—we do not even put a forced construction on ambiguous phrases;—still less do

we destroy any interests, estates, or powers created by other clauses of the will.

There are no words in this will under which any issue male can take as purchasers: if they take at all, it can only be as issue in tail of the plaintiffs. The construction contended for by the plaintiffs is the only [*129] *one which can effect the general intention of the testator; and in effecting that general intention, we have not to disappoint any particular purpose apparent on the will.

If the plaintiffs take an estate tail in the lands, it necessarily follows that they take the personalty absolutely. *Love* v. *Wyndham*,(*a*) *Burford* v. *Lee*,(*b*) *Anonymous*.(*c*)

Sir *Charles Wetherell* and Mr. *Preston*, for the daughters of Mrs. Strong, who were born at the date of the will.

It is not at present necessary for the defendants to do more than contend that the plaintiffs do not take an estate tail. If the plaintiffs take only a life estate, then at their decease the court will have to decide what particular estates or interests the different classes of defendants take; but that question does not arise now.

The testator, in framing his will, had in view the state of the families of his two nieces. They had each a daughter and no other issue; and as he did not contemplate the possibility of their having more children, his plan was to give his property to his nieces for life, and, after their death, not to their issue, but to the issue of their daughters. As to his intention that the nieces should not take more than a life estate, not a doubt can be entertained; for the income is expressly given to those ladies for their lives, and there is superadded to the gift a qualification which is suitable only to the nature of a life estate—the qualification of its being to their separate use. That [*130] the issue, who were to take, *were to be issue, not of his nieces, but of their daughters, Mrs. Strong and Mrs. Peyton, is evident from the language of various parts of the will. After the gift to the plaintiff for life, comes this clause, "and after their decease to such child, or if more than one, to the use of such children in manner following, (to wit) if male issue of my niece Mrs. Sheen Houghton, daughter Mrs. Strong." The issue male, therefore, who are to take, are issue male of Mrs. Strong; and it is upon failure of such issue male that the gift over to the grand daughters is to take effect. In the inaccurate way in which this testator has expressed himself, it is not surprising that, meaning to refer to the issue male of the daughters of the nieces, he has spoken of them as issue male of the nieces themselves: and when he says "from and after the decease of my two nieces, Elizabeth Sheen Houghton and Charlotta Griffith, and failure of their male issue," the word *such*

(*a*) 1 Lev. 290. (*b*) Freeman, 210.
(*c*) Freeman, 287. Fearn's Contingent Remainders and Executory Devises, 461, 480.

ought to be inserted, and we ought to read "such their male issue," namely, the male issue of whom he had before spoken.

In the clause relating to the occupation of the Barton House, and the use of the plate, linen, and furniture, the testator repeatedly speaks of "such sons or daughters" as should come into possession of the estate by virtue of his will. The daughters, it is admitted, were to be daughters, not of the nieces but of Mrs. Strong and Mrs. Peyton; the sons, therefore, must also mean sons of Mrs. Strong, or sons of Mrs. Strong and Mrs. Peyton; and they were to take as purchasers, and not an issue in tail.

The gift to such male issue is contained in the manifest intention of the testator to give to them; in the same way as the gift of a fund(*a*) to a son after the *death of his mother, is considered to operate as giving [*131] the mother a prior interest; and, the trustees taking a fee, the cestuis que trust, by virtue of the estate which is in the trustees, will take the fee even without express words of limitation; *Preston* v. *Funnell*,(*b*) *Newland* v. *Shephard*,(*c*) *Peat* v. *Powell*,(*d*) *Reade* v. *Reade*.(*e*)

Therefore the issue male take as purchasers in fee; whether as joint tenants or as tenants in common, is of little consequence; and if there is no issue male at the decease of the two nieces, the devise over to their grand daughters will take effect; for it is apparent on the various clauses of the will, that the gift over is, not upon an indefinite failure of issue male, but on the failure of issue male at the decease of the nieces. That this is the true construction of the gift to the grand daughters is apparent from the terms in which the gift is expressed, from the mode and qualities of the gift, from the circumstances of its being confined to the grand daughters then living, and from the clause in which the testator says, "and my meaning is, that if Miss Eliza Griffith married and have issue, that Eliza Griffith and her children share in this my bequeathment equally with Mrs. Sheen Houghton, but not till after the decease of my two nieces."

If it were deemed more consonant with the langnage and plan of the will that the estate of the issue male should be an estate tail, such a construction may be adopted on the principle of Mandeville's case.(*g*)

If the construction were to be adopted which gives an estate in tail male to the plaintiffs, two consequences *would follow, each of [*132] which is inconsistent with the manifest purpose of the testator. First, the issue male of Mrs. Strong, whom he unquestionably meant to include among the objects of his bounty, could never take any interest in the property; secondly, the gift to the grand daughters must have been from the beginning void and inoperative.

Mr. *Agar*, for the sons of Mrs. Peyton:—The testator in a prior part of his will gives legacies of 300*l.* to each of the grand children of Mrs. Houston; and when, a few sentences afterwards, he devises, after the decease of his nieces,

(*a*) Cro. Jac. 75. (*b*) Willes, 164. (*c*) 2 P. Wms. 194.
(*d*) Ambler, 387. (*e*) 5 Ves. 744. (*g*) Coke Litt. 26, b.

"to such child, or if more than one, to the use of such children in manner following," the word *such* has reference to the children of whom he had before spoken, namely, the grand children of Mrs. Houston; and there is a subsequent clause the effect of which is to declare that the children of Eliza Griffith are to take equal benefits with the descendants of Mrs. Houston. The children of the two great nieces are the persons to whom, on the decease of the nieces, his property is to go. It is also clear that among those children he meant to prefer the sons to the daughters.

To give an estate tail to the plaintiffs would not effect any intention of the testator, either particular or general; but would defeat the whole plan on which he has disposed of his property. Even if the words were sufficient to raise an estate tail in the freeholds of inheritance, they ought not to be construed so as to give the personal property absolutely to the first taker. In no case have words, similar to those which are found here, been held to amount to an absolute bequest of personal property; and the same words, occurring in the same instrument, may receive a very different construction [*133] *with respect to real estate on the one hand, and personalty on the other. *Forth* v. *Chapman*,(a) *Jacob* v. *Amyatt*.(b)

Mr. *Pepys*, for the same parties, contended that the sons of Mrs. Strong and Mrs. Peyton took the real estate as tenants in common in fee, and the personalty absolutely as tenants in common.

Mr. *Heald* and Mr. *Knight*, for Mr. and Mrs. Peyton and their daughters, and the daughters of Mrs. Strong born after the testator's death, cited *Glenorchy* v. *Bosvil*,(c) *Papillon* v. *Voice*,(d) *Leonard* v. *Lady Sussex*.(e)

Mr. *Horne*, Mr. *Treslove*, Mr. Serjt. *Russell*, and Mr. *Lynch*, for Lesingham, who, as administrator of Lady Tempest, represented the testator's next of kin.

The rule as to the implication of estates tail is not applicable here, because the income of the property is given to the plaintiffs for their life, to their separate use and without power of anticipation. Now, where is there any authority which will sustain the position that a devise to trustees in trust for a woman during her life, to her separate use, and without power of anticipation, with remainder over, in default of her issue, will give her an estate tail?

The cases which have been cited on the part of the plaintiffs are distinguishable from the present in this respect, that in all of them there was apparent on the face of the will an intention to give an interest to the children [*134] *of the tenant for life; in most, if not in all of them, there were express limitations to sons or heirs of the body, or issue of the first taker, which came between his estate for life and the ultimate gift; and the effect of raising an estate tail by implication was to include all those in-

(a) 1 P. Wms. 664. (b) 4 Bro. C. C. 512. See also 13 Ves. 479, note. 1 Mad. 376, note.
(c) Cas. temp. Talb. 3. (d) 2 P. Wms. 471. (e) 2 Vern. 527.

dividuals for whom a benefit was manifestly intended. Here there is no apparent intention that the property should be enjoyed by the children of the tenants for life, or by any of that class of issue for whose sake the court is required to create an estate tail: the very basis of legal implication is wanting.

The clauses on which the counsel for the other defendants have commented, show that the issue, whom the testator had in view, were issue, not of his nieces but of the children of his nieces: and the direction as to accumulation may be referred to for the same purpose. If the plaintiffs are right in their construction, they take the personalty absolutely; the testator, on the other hand, provides, that after their decease, the income of the property shall in certain events, be held on trusts for accumulation: can any two things be, more contradictory than absolute ownership in the plaintiffs, and yet a trust for accumulation after their death? The intention manifested throughout the will must exclude the implication of an estate tail.

But though it is clear, that, in speaking of issue, the testator meant issue of some person or persons other than his nieces, it is very uncertain which issue in particular he did mean; and there are no words of gift to any class of issue, nor any limitation to them of a definite quantity of interest. The clause under which the grand daughters claim is so confused and ambiguous that it would be difficult to put a consistent interpretation on it, and if a gift to them can be extracted *from it, still that gift will be too [*135] remote. The consequence is, that, with the exception of the estates for life to the nieces, all the other dispositions of the will are void either for uncertainty or remoteness. *Thomas* v. *Thomas*,(a) *Doe* v. *Joinville*,(b) *Boehn* v. *Clarke*,(c) *Gardner* v. *Sheldon*.(d)

Mr. *Sidebottom*, for the trustees:—Mr. *Sugden* in his reply cited and commented on *Doe* v. *Joinville*,(e) *Forth* v. *Chapman*,(g) *Brouncker* v. *Bagot*,(h) *Gardner* v. *Sheldon*,(i) *Stanley* v. *Stanley*,(k) *Austen* v. *Taylor*,(l) *Romilly* v. *James*.(m) He contended that the argument for the defendants was inconsistent with itself, and with the settled principle of construction. The issue male, on whose failure and not sooner the property was to go over, were expressly described to be the issue male of Mrs. Houston and Mrs. Griffith: how could those plain words be controlled by imperfect and ambiguous phrases? There were no words of gift to any issue male as purchasers; and no issue male could possibly take but through the medium of an estate tail in the plaintiffs. The argument for the defendant Lesingham, in fact, was this: "when the testator has said issue male of A., we shall conjecture that he meant issue male of C., and then as there are no words under which C. can take any thing, an intestacy will ensue, so that we may claim the property, in

(a) 6 T. R. 671. (b) 3 East, 172. (c) 9 Ves. 580. (d) Vaugh. 259.
(e) 3 East, 172. (g) 1 P. Wms. 663. (h) 1 Mer. 271. (i) Vaugh. 259.
(k) 16 Ves. 491. (l) Amb. 376. (m) 6 Taunt. 263.

opposition on the one hand to the express words of the will, and on the other to the disappointment of what we allege to have been his meaning."

[*136] *There is, unquestionably, much obscurity in some parts of the will; but the plaintiffs rely on what is clear; and the defendants on what is confused and obscure.

1828; *December* 3.—THE LORD CHANCELLOR:—In this case the attention of the court has been directed to a will, perhaps the most confused in its terms and provisions of any ever submitted for judicial decision. It consists of unfinished sentences, of words put together without regard to grammar or the ordinary rules of language, and of bequests and dispositions which appear so contradictory and unintelligible as to render it almost impossible to put upon it any reasonable or consistent construction.

The main question which was argued, and which stands for decision is, whether the plaintiffs, the nieces of the testator, took under the will an estate for life only in the property in question. The devise gives them an estate for life in express terms: but it is contended, on the part of the plaintiffs, that, in order to fulfil the general intention of the testator, the estate for life must be enlarged into an estate tail. The plaintiffs have acted upon this view of their case; and in the year 1817, three years after the death of the testator, they suffered a recovery of such part of the property to which the testator was entitled in fee at the time of his decease.

It is necessary, in order to form a correct opinion on this point, to consider in succession the different provisions of the will. The testator devises all his property,—freehold, copyhold, leasehold and personal estate, of every description,—to trustees, "in trust and confidence that they should hold all his lands, tenements, real and personal property, and all his estates and

[*137] *interest therein, to be holden by his said trustees in trust, and then apply the income and annual amount of such property to the use of his two nieces, Elizabeth Sheen Houston aud Charlotta Griffith (the plaintiffs) for their lives, and proper use and benefit." Here a life estate is expressly given to the two nieces. The testator then proceeds thus:—"And after the decease of my two nieces, the trustees are to hold the estates and property devised, to the use of such child, or, if more than one, to the use of such children, in manner following (to wit,) if male issue of my niece, Mrs. Sheen Houghton daughter Mrs. Strong, then I give and devise to my trustees that they shall hold all my lands in trust and confidence, that they shall hold my will is: and he goes on to direct that whether of his real or personal estate and interest therein shall come to his two nieces by virtue of his will, shall be for their sole and separate use. In this clause of the will, he appears to have had it in contemplation, that, upon the death of his two nieces, the male issue of Mrs. Strong should take some interest in the property; but the disposition and sentence are left imperfect, and what the testator's precise intentions were in this respect does not appear.

After the directions as to the interest taken by the nieces being to their separate use, the testator proceeds in the words, "Then from and after the decease of my two nieces Eliza Sheen Houghton and Charlotta Griffith, and failure of their male issue, and satisfying my before mentioned gifts and bequeths, my trustees shall hold in trust for the use of Eliza Sheen Houghton and Charlotta Griffith, my two nieces, their grand daughters when they attain the age of twenty-one years, or be married with the consent and approbation of their mother, and my trustees;" and then he directs what is to be done, if they marry without such consent. The material question *appears to be, as to what the testator intended by the words "and [*138] failure of their male issue." Did he use these words in the ordinary sense? or are there circumstances in the will and in the disposition of his property to show that he used them in a peculiar and qualified sense? Did he mean to include sons of the nieces, or had he in view only grand sons, the sons of the daughters of his nieces? In the former clause to which I have adverted, it is clear, although the sentence is left imperfect, that he contemplated, and had in view, the male issue of Mrs. Strong as the issue to take on the death of the two nieces. He expressly names the male issue of Mrs. Strong; but by some accident, or from that extraordinary ignorance and confusion that displays itself in every part of the will, the sentence remains unfinished. In a subsequent part of the will the testator directs that, if Miss Eliza Griffith, the daughter of the testator's niece Charlotta Griffith, should marry and have issue, she and her children should "share in the testator's bequeathment equally with Mrs. Sheen Houghton, but not till after the decease of the two nieces." It appears, therefore, that the issue of the two nieces, or rather of the children of the two nieces, were intended by the testator to be on a footing of equality.

The testator afterwards directs, that every such child, who should take his estate by virtue of his will, should take his surname, and inhabit the Barton House, and make it his residence and place of abode. He then proceeds thus: "Also I give and bequeath to my two nieces Elizabeth Sheen Houghton and Charlotta Griffith all my plate, linen, and household furniture, upon trust during their natural lives, the use and enjoyment of all such, and after their decease, to the use of such son or sons, and daughters, as my will directs, as shall from time to time come into the possession of my estates, and inhabit the *Barton House." Here then, after the decease of his two [*139] nieces, the use and enjoyment of the testator's plate, linen, china, and furniture, are given to such son or sons and daughters as shall, by the directions of his will, from time to time come into possession of his estates and inhabit the Barton House. The sons and daughters are here coupled together, —"such son or sons and daughters." But the daughters who were to take, were the daughters, not of the nieces, but of Mrs. Strong and Eliza Griffith they were the grand daughters of the nieces. It seems, therefore, an obvious inference, that by sons he meant sons of the same persons, and that they are

the "male issue" whom he contemplated in the former part of the will; for, if the terms "issue male" were used in the strict sense, the sons of the daughters would not take.

The same observation and the same inference arise out of the next clause, in which he directs that the plate, furniture, &c. in the house at Barton shall remain after the decease of his nieces, for the use of such child, sons, or daughters, that come to the possession of the estate by virtue of his will. "But" (he proceeds,) "in case of failure of issue male, I devise to the female grand daughters of Eliza Sheen Houghton, and Charlotta Griffith, grand daughters, then my will, that my trustees shall hold," &c. Here the expression "issue male" occurs again, and the use of it, in this particular place, appears to me to confirm the interpretation I have put upon it; for after coupling together sons and daughters as before, i. e. the daughters of Mrs. Strong and Eliza Griffith, the grand daughters of the nieces, he directs, that, in case of failure of issue male, the female grand daughters shall be entitled as tenants in common; and he further confines this to those who shall be then living.

It would appear, therefore, that the "issue male" here contemplated
[*140] *by the testator were the issue male of the daughters of the nieces, and, in fact, the sons of such daughters.

That it was the intention of the testator to use the term "male issue" in the sense which I have here given to those terms, is in some degree confirmed by the state of the family at the date of the will; Mrs. Strong, the only daughter of the testator's niece, Mrs. Sheen Houston, being then twenty-five years of age, and Mrs. Eliza Griffith, the only daughter of Charlotta Griffith, being twenty-two years of age.

It is not necessary, with reference to this point, to decide what estate would have been taken by any son or sons of Mrs. Strong and Eliza Griffith, if it sufficiently appears, which I think it does, that the sons of the nieces were not meant to be comprehended by the testator under the terms "issue male" as used in the will.

If this be the correct interpretation of the will, as applicable to this point, the nieces will be entitled only to a life interest in the property, and it is quite obvious from the whole will, however obscure in its general provisions, that the testator did not mean to give them more than a life interest. I am of opinion, then, that the plaintiffs took only a life interest in the property in question, which, in the present state of things, is all, I think, I am required to decide. What, ultimately, as between the other parties the defendants to this suit, will be the construction which the court may feel itself called upon to give to this instrument, and whether or not any reasonable and consistent interpretation can be given to it, are questions which it seems unnecessary at present to anticipate.

[*141] *1831.—The plaintiffs appealed to the house of lords against so

much of the decree as declared that they took only a life interest in the property.

The house of lords affirmed Lord Lyndhurst's decree.

1832.—The tenants for life had renewed the leaseholds for years every seven years, and had paid the fines and expenses of these renewals. They now presented a petition praying that the sums, which they had so laid out, might be repaid to them out of the personal estate, and that the future expenses of the renewals of the leaseholds for years and leaseholds for lives might be borne by that fund.

Sir *Edward Sugden* and Mr. *J. Russell*, for the petition.

Mr. *Treslove* and Mr. *Lynch*, contra.

THE VICE-CHANCELLOR thought that the expenses of the renewals ought to be borne by the general personal estate, and made the order accordingly.

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*PARRY *v.* WRIGHT. [*142]

1828; May 5.

A. contracted for the purchase of certain lands, which were subject to a first mortgage to M., and to a second mortgage to P.; one of the terms of the agreement being, that out of the purchase money, A. should retain in his hands the sum of 5010*l.* in order to pay off these incumbrances; and by indentures of lease and release, reciting the mortgages, the estate was conveyed to him. Afterwards, M., in consideration of 3220*l.* stated to have been paid to him by A., conveyed, by A.'s direction, the premises to G. in fee, and it was declared, that a trustee of an outstanding term should hold that term in trust for G, to attend the inheritance. By another indenture of the same date, and executed at the same time, reciting that W. had agreed to purchase of A. an annuity of 500*l.* for 5000*l.*, and that the 3220*l.* was in fact the money of W., and part of the 5000*l.*, and was paid to M. by W.'s agent, at A.'s request; A., in consideration of the 3220*l.* and of 1780*l.*, granted to W. an annuity of 500*l.*, to be issuing out of the lands; and G., by A.'s direction, demised the premises to a trustee for 500 years, upon trust, to secure the rent charge: Held, that P. was now the first incumbrancer, and that W. was not entitled, to the extent of the money paid to M, to have M.'s mortgage considered as still subsisting, and to have what might be payable in respect of it, applied from time to time in satisfaction of the arrears of his annuity.

IN 1807, Madocks contracted for the purchase of certain lands which were subject to a first mortgage to Sir Thomas Mostyn, and to a second mortgage to the plaintiff Parry; one of the terms of the agreement being that, out of the purchase money, Madocks should retain in his hands the sum of 5010*l.* in order to pay off the incumbrances: and by indentures of lease and release, dated the 15th and 16th of December, 1807, which recited the mortgages, the estate was conveyed to him. By indentures of lease and release, dated the 21st and 22d of June, 1810, Mostyn, in consideration of 3220*l.*, stated to have been paid to him by Madocks, conveyed the premises by Madocks' direction to Girdlestone in fee; and it was declared that a trustee of an outstanding term should hold it in trust for Girdlestone to attend the inheritance. By another indenture of the same date, and executed at the same time, reciting

that Wright had agreed to purchase of Madocks an annuity of 500*l.* for 5000*l.*; that the 3220*l.* was, in fact, the money of Wright, and part of the 5000*l.*, and was paid to Mostyn by Berkley as Wright's agent at Madocks' request,—Madocks, in consideration of the 3220*l.*, and of 1780*l.*, granted to Wright an annuity of 500*l.* to be issuing out of the lands, and Girdlestone, by
[*143] Madocks' directions, demised the premises to *Berkley for 500 years upon trust to secure the rent charge.

The question in the cause was, whether the plaintiff Parry was now the first incumbrancer, or whether Wright, to the extent of the money paid to Mostyn, was entitled to have that mortgage considered as still subsisting, and to have what might be payable, in respect of it, applied from time to time in satisfaction of the arrears of his annuity?

THE VICE-CHANCELLOR held that Parry was the first incumbrancer;(*a*) and Wright appealed against the decree.

Mr. *Pepys* and Mr. *Koe*, for the plaintiff:—It is admitted that Wright had constructive notice of the plaintiff's mortgage: having such notice, he takes his conveyance not from Mostyn, but from Madocks, and from Girdlestone, who was Madocks' trustee; he, therefore, is bound by the same equity by which Madocks would have been affected. Wright never contracted to be the first incumbrancer, or to be the assignee of Mostyn's mortgage: his agreement was for the purchase of an annuity to be charged on the estate, and what he stipulated for was, that Mostyn's mortgage should be paid off, not that he should become mortgagee in Mostyn's stead. In pursuance of this agreement, a sum, which is received from Wright as part of the purchase money of his annuity, is paid to Mostyn by Madocks' direction; and Mostyn, by a deed to which Wright is not a party, conveys his legal estate to Girdlestone. Madocks then grants to Wright an annuity, charged on the estate, and Girdlestone, by Madocks' direction, demises the lands for a term
[*144] of 500 years to *a trustee for Wright, as a security for the payment of the rent charge. Girdlestone, therefore, was clearly a trustee for Madocks; for whom can he be imagined to have been a trustee, except for the person at whose request and by whose direction he deemed himself bound to convey? In none of the deeds is a single word to be found, which in any way imports that Girdlestone was a trustee for Wright, or that, as between Wright and Madocks, Mostyn's mortgage was considered to be subsisting for the purpose of protecting Wright against mesne incumbrances. Both in form and in substance, the transaction was merely a charge of the annuity on such estate and interest as Madocks had then in the lands; and though Wright has acquired the legal estate, yet, as he took it from Madocks' trustee, with notice of the plaintiff's incumbrance, he must be postponed in the same manner in which Madocks himself would have been postponed. *Toulmin* v.

(*a*) 1 Sim. & Stu. 368; where the facts and instruments, on which the question arose, are stated more at length.

Steere.(a) The old mortgage to Mostyn no longer exists; and if it could be considered as still existing, it could not be used to protect the annuity by way of collateral security.

Mr. *Sugden*, for the appellant:—The ground of the Vice-Chancellor's judgment is contained in a single sentence:—"How, then, can Mr. Wright, who accepts this term for 500 years from Mr. Girdlestone as a trustee of the fee for Mr. Madocks, contend that it was not the true intention of the transaction that Mr. Girdlestone should hold the fee in trust for Mr. Madocks?" But where do we find the two material facts,—that Girdlestone was merely a trustee for Madocks, and that it was the intention of Wright and the other parties to the transaction, that Girdlestone should be a trustee for Madocks, and for Madocks alone? It is admitted that all the deeds of the *15th [*145] and 16th of December, 1807, must be considered as parts of one and the same transaction. The second deed tells us that the money paid to Madocks was Wright's money; that it was paid to him by Berkley as Wright's agent; that it passed, therefore, directly from Wright to Mostyn, and did not even go through Madocks' hands. Mostyn never was a trustee for Madocks; he could not become a trustee for him except by the direction of the person who actually paid the money; Girdlestone knew that the money paid to Mostyn was the money of Wright, not the money of Madocks; and he could not, any more than Mostyn, become a trustee for Madocks, except by the direction of Wright. We find in these deeds a recital of a contract which was entered into with Wright before Mostyn was paid off: that prior contract bound the lands; and Wright, having paid his money, became in equity an incumbrancer on the estate. Suppose that, after the conveyance from Mostyn to Girdlestone, the contract for the annuity had not been completed, for whom would Girdlestone have then been a trustee? He was the assignee of Mostyn's estate; that assignment had been made in consideration of money paid by Wright, who was to have a security upon the property: the first trust, therefore, must have been for Wright; and Wright could have filed a bill to enforce his security on the interest which passed by the conveyance from Mostyn. The old term was left outstanding on trust to attend the inheritance, in order that Mostyn's incumbrance might still be available for Wright's protection.

If Girdlestone was to be a trustee for Madocks, what was the object or purpose of introducing him at all into the machinery? Why was not the conveyance made directly from Mostyn to Madocks? Why, at least, was not a trust for Madocks declared or expressed? The *conveyance [*146] was made to Girdlestone, and not directly to Madocks, because we wished to keep the legal estate out of Madocks; we did not permit any declaration of trust for Madocks to be inserted, because it was not the intention

(a) 3 Mer. 210.

of the parties that there should be any trust for him, except subject to Wright's incumbrance.

Mostyn was known to be the first incumbrancer; and the contract was, that Wright, to the extent of that mortgage, should become the first incumbrancer. Girdlestone was to hold the estate in trust for Wright in the first instance, and, subject to his incumbrance, for Madocks. The only reason why an express trust for Wright was not declared in the conveyance from Mostyn, was, that Madocks did not wish Mostyn to know that he had granted so large an annuity.

The Vice-Chancellor asks how Wright can deny that Girdlestone was a trustee for Madocks, when he accepts from Girdlestone a demise for a term of five hundred years. That term was taken, because Wright wished to have more than a merely equitable interest attaching upon the estate which was in Girdlestone as a trustee. If an express declaration of trust had been inserted in the conveyance from Mostyn, the purport of it would have been that Girdlestone was to hold in trust for Wright, till he was paid off, and then for Madocks; and such is the effect of the transaction and the deeds as they stand. But Wright chose to have more. Instead of being satisfied with merely the creation or declaration of a trust, he called on his trustee to convey to him a portion of the legal estate: and it was fit and proper that that conveyance to Wright's trustee should be by the direction of Madocks, for the trust of the fee was for Madocks, subject to Wright's incumbrance.

Where, then, is the ground for alleging that the creation of the term [*147] of 500 years proves that *Girdlestone held in trust for Madocks only, and in no way for Wright? Suppose that Mostyn, by the direction of Madocks, had conveyed to Girdlestone as a releasee to uses, to the use of Wright for 500 years, would not the priority of Wright have been unquestionable? Yet that form of conveyance would not have given Wright the legal estate more effectually than the deeds as they now stand, and would not have excluded the operation of any supposed equity against Wright, of which, in the actual state of things, the plaintiff can claim the benefit.

Girdlestone, therefore, was not a trustee for Madocks alone. The whole of the transaction shows that it is not the fact that he was a trustee of the whole fee for Madocks; that it was not the contract that he should be so; and still less was it the intention of the parties. To impute such an intention to them is to suppose that they meant to improve the situation of the plaintiff, and to give him a priority which he did not possess, and which he had no right to call for. The plaintiff, at the time when he originally advanced his money, was a second incumbrancer; he had no portion of the legal estate; and he had no right to compel any person to pay off the prior mortgage. That mortgage has been paid off, not with his money, not with the money of the mortgagor, but with the money of a third person, who, not having actual knowledge of the existence of the plaintiff's charge, and not being bound by any contract with him, has acquired the legal estate. Where

is the equity of the plaintiff to a priority over the legal estate? We do not seek to alter his situation; we leave him merely where he was. He, on the other hand, says, that our money is to be considered as applied for his benefit, and that we have paid off the first mortgage, not that we ourselves may stand in the shoes of the mortgagee, but for the sake of bettering the situation of the second *incumbrancer. He who endeavors to raise in his [*148] own favor such an equity out of the acts of other persons, to which he was not privy, ought to show that they were under some obligation to confer on him the benefit which he claims.

The judgment of the court below proceeds on a refinement, which is not supported by any authority. *Toulmin* v. *Steere*(*a*) has no application to the present case; and the decision there has not been considered as free from doubt. Sir Samuel Romilly and I signed an appeal from Sir W. Grant's decree; and the only thing which prevented the appeal from being prosecuted was, that a relation of the family paid the money in order to put an end to the litigation.

Mr. *Pepys*, in reply.

THE LORD CHANCELLOR:—Wright's contract was, that he should pay 5000*l.* to Madocks, of which Madocks was to pay part to Mostyn: the parties not choosing to trust Madocks with the whole money, that part of it is paid to Mostyn by Wright's agent; but that was a payment under the contract with Madocks, and in Madocks' name, and not under any contract between Wright and Mostyn. There is nothing in the transaction to make Girdlestone a trustee for any person but Madocks. If Girdlestone had not been a trustee for Madocks, why should the term of 500 years have been created as a security for Wright?

The decree of the Vice-Chancellor was affirmed.[1]

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*HORNBY *v.* HUNTER.(*b*) [*149]

1828; June 7.

THE lord chancellor affirmed the decree of the Master of the Rolls.[2]

(*a*) 3 Mer. 210. (*b*) Reported, supra. vol. i, p. 89.

[1] Vide *Smith* v. *Phillips*, 1 Keen, 694, 699, n. *a*, *Brown* v. *Stead*, 5 Sim. 535, *Harman* v. *Forster*, 1 Dru. & Walsh, 637, *Hood* v. *Phillips*, 3 Beav. 513, *Searle* v. *Colt*, 1 Yo. & Coll. C. C. 36, 43.

[2] The points decided in this case, by Lord Gifford, M. R. are stated in the report, 1 Russ. 89, as follows:—"In a suit against defendants, who were personal representatives both of a testatrix who died during the coverture, and of her husband praying an account of her separate estate, and a declaration that certain sums of stock which stood, and always had stood, in her name, constituted part of that estate, although the husband and his executors, during a long period of years had uniformly acknowledged these sums to be, and dealt with them as being part of her separate property, and although strong evidence was adduced by the plaintiff, which was not met by any evidence on the other side;

ATTWOOD *v.* ———.

1828; June 9.

W. holding title deeds as an equitable security for a debt due to him from N., and being also solicitor of S., to whom N. owed a sum of money, for which S. held other securities; N. wrote a letter, which was left at the office of W., stating that he, W., out of the proceeds of the sale of the property, of which he held the title deeds, was to receive the amount both of his own debt and of the debt due to S.; afterwards W. received from N. the amount of his own debt, and without the sanction of S. delivered up the title deeds in his possession to N. who sold the property, received the purchase money, and did not pay any part of it to S,; *Semble*, W. is in point of law liable to S. for any loss which S. may thus sustain.

If a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bona fide*, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement; and a court of equity, without considering whether he was in truth liable to the claim, will compel a specific performance.

THE circumstances of this case are stated in vol. i. p. 353.

The defendant appealed against the decree of the Master of the Rolls.

Mr. *Sugden* and Mr. *Roupell* jun., for the appellant.

Mr. *Horne* and Mr. *Rawlins*, contra.

THE LORD CHANCELLOR:—The appellant had been the solicitor of Mrs. Shackle's husband; he had been concerned on the part of Shackle in negotiating a loan to Norton; he knew all the particulars of the transac-
[*150] tion, and of the securities which *Shackle held for the loan. He was in possession of the title deeds of a leasehold property in Uxbridge, also belonging to Norton, on which he had an equitable charge for a sum of 1000*l*; and having been directed to apply to Norton for the money due to Mrs. Shackle, Norton writes a letter, which is left at W.'s office, stating that, out of the proceeds of the sale of those leasehold, he is to receive 2500*l*.—1000*l*. for himself, and 1500*l*. for Mrs. Shackle. After this, he was not justified in parting with the title deeds, without receiving the 1500*l*; and having parted with them, he would, in point of law, be liable for the loss which Mrs. Shackle might thus sustain. There is not sufficient and distinct evidence before me to show that Mrs. Shackle subsequently waived any right which she might have; and there is, therefore, nothing to exempt this defendant from his responsibility.

A claim having been made against him on Mrs. Shackle's behalf, he consults a gentleman at the bar of great eminence, who tells him that, in point of law, he is answerable to Mrs. Shackle. There is a second meeting at the chambers of the same counsel; and, finally, the defendant enters deliberately

yet the court refused to make the declaration at the original hearing and only referred it to the master to take the account generally, with special inquiries founded in the evidence. Where an inquiry as to debts has been directed before decree, and the master has reported that there are no debts, the decree at the original hearing must nevertheless direct an account of debts." As to prospective directions to the master, see *Twyford* v. *Trail*, 3 Myl. & Cr. 650, and n. 1. Ibid.

into the agreement, from which he has since sought to escape. The agreement, having been entered into under such circumstances, binds him; and the decree of the Master of the Rolls must be affirmed with costs.[1]

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*Blackmore v. The Glamorganshire Canal Company. [*151]

1828; June 6.

Answering an affidavit is a waiver of any objection which might be taken to it, on the ground of notice not having been given that it was to be used.

An affidavit, entitled in the original suit, was sworn on the 17th of May; a supplemental bill was filed on the 19th of May. Notice of motion was given, entitled in both suits; and an affidavit was filed in answer to the affidavit sworn on the 17th of May.

It was objected that the affidavit sworn on the 17th of May could not be used on the argument of the motion; first, because it was filed before notice of motion was given, and, secondly, because it was entitled only in the original suit.

The Lord Chancellor was of opinion, that the filing of an affidavit in answer was a waiver of any objection which might have arisen from the omission to give notice that the affidavit sworn in the original cause would be used; that the parties were in the same situation as if such notice had been given; and, therefore, that the affidavit might be used.

Mr. *Pepys*, Mr. *Bickersteth*, Mr. *Wakefield*, and Mr. *Monro*, for the plaintiff.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Knight*, for the defendant.

[1] "If a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions that may be agreed upon." Leach, V. C. *Naylor* v. *Winch*, 1 Sim. & Stu. 564. And see *Harvey* v. *Cook*, 4 Russ. 34. *Neale* v. *Neale*, 1 Keen, 672.

[*152] *Ex parte Ridgway.

In the matter of Crompton.

1828; June 7.

The court will not give any directions touching the property of a person of unsound mind, where no commission of lunacy has issued, though the fortune of such person consist only of an annuity of 50*l.*, and 150*l.* of arrears; and though the next of kin and the parties who have to pay the annuity submit to such order as the court may make.

Crompton was thirty-two years of age, and had been six years a lunatic; but no commission of lunacy had issued: the whole of her property consisted of an annuity of 50*l.* a year, bequeathed to her by John Williams, and of 150*l.* due for arrears of this annuity; her next of kin were not in circumstances which enabled them to maintain her.

The petition was presented by the acting executor of her father's will, under which she did not take any benefit: it prayed a reference to the master to inquire into the state of Crompton's mind, and the amount of her fortune, and if she should be found to be of unsound mind, that the care and custody of her estate and person might be granted to the petitioner, and that the arrears and future instalments of the annuity might be paid to him in order to be applied for her maintenance.

Mr. *Ching*, for the petition, stated that the object was to enable the executors of Williams to pay the annuity, which was the only fund applicable for the maintenance of this lunatic. Without such an order as was suggested, the executors could not safely pay the annuity, unless a commission were issued; and the expenses of a commission would so much reduce the small property which the lunatic was entitled to, that it would no longer be sufficient for her maintenance. It is stated(*a*) that what is now asked [*153] had been done by *Lord Northington and Lord Thurlow; and an instance is mentioned in which Lord Thurlow made such an order, though the income was 75*l.* a year. The same principle has been followed by succeeding judges, *Eyre* v. *Wake*,(*b*) *Machin* v. *Salkeld*,(*c*) *Ex parte Pickard*:(*d*) it was an exercise of jurisdiction highly beneficial to the public, and unattended by the hazard of any evil consequences.

The next of kin consented to the application; and the executors of Williams submitted to any order that the court might make.

The Lord Chancellor stated, that what this petition called upon him to do was an irregularity; and that he would not add to the number of cases in which the irregularity had been committed; and he declined to make any order on the petition.[1]

(*a*) 4 Ves. 798. (*b*) 4 Ves. 795. (*c*) 2 Dickens, 634. (*d*) 3 Ves. & B. 127.

[1] Lord Lyndhurst, in his third Chancellorship, adhered, inflexibly, to the principle of the above case; namely—that the court would not act in relation to the property of a lunatic, until he had been found to be such by inquisition. *Gillbee* v. *Gillbee*, 1 Phillips' Rep. 121.

*Ex parte Haycock.(a) [*154]

In the matter of Jones.

1828; June 24.

An allowance will be made out of a lunatic's estate for his illegitimate children, but not for their mother.

The court will not direct property to be sold, which the lunatic, by a will made when he was of sound mind, has bequeathed specifically, though the master has reported that the sale of it will be beneficial to the estate.

This was a petition presented by the committee of a lunatic's estate, praying a reference to the master to approve of a proper allowance for four illegitimate children of the lunatic and their mother.

In support of the application, Mr. *Wakefield* referred to the doctrine laid down by Lord Eldon in *Ex parte Whitbread*,(b) and to two cases not reported; *Ex parte Galpin*, in which a gross sum had been allowed for the benefit of illegitimate children, and *Ex parte Spurrell*, in which a yearly sum had been appropriated for their maintenance.

The Lord Chancellor directed a reference to the master to inquire what ought to be allowed for the maintenance of the children, but declined to extend the order to their mother.

The master had reported that it would be for the benefit of the lunatic's estate that certain furniture should be sold; and the petition prayed a sale of this furniture.

It appeared that the lunatic, when sane, had made a will, by which he bequeathed this furniture to a particular individual; and one point submitted to the court was, whether, under such circumstances, the *court would interfere to defeat the bequest, by directing the property to be sold. [*155]

The Lord Chancellor said that he would not defeat the intention which the lunatic had manifested, when sane, and, therefore, that no direction should be given for the sale of the furniture.

(a) Ex relatione. (b) 2 Mer. 101.

In the Matter of a Writ of Error wherein JOHN PLASKETT is the Plaintiff, and CHARLES BONNER is Defendant.

1828; July 17.

After a writ of error *non prosd* in the exchequer chamber, the plaintiff in error brought a writ of error returnable in parliament, which recited that the judgment of the court below had been affirmed in the exchequer chamber: the latter writ was superseded with costs.

IN Michaelmas, 1827, Bonner commenced an action in the exchequer of pleas against Plaskett, on a bill of exchange. The cause was tried, and a verdict given for the plaintiff. On the 22d of April, and after verdict, Plaskett filed a bill on the equity side of the exchequer for an injunction; but the answer was put in so as to prevent the injunction from issuing, and no further proceedings were taken in that suit. On the 18th of May, 1828, final judgment on the verdict was signed. After the costs had been taxed, the allowance of a writ of error, returnable before the lord chancellor and the treasurer and barons of the exchequer in the council chamber of the exchequer, was served on Bonner; but no errors being assigned, and the writ not being prosecuted, Bonner, on the 17th of June, obtained a rule of the exchequer chamber to *non pros.* that writ. On the 18th of June, Plaskett sued out of chancery a writ of error returnable in parliament. The writ was in the following form:—"To our treasurer and barons of our exchequer, for as much as in the record and process, as also in giving of judgment in a [*156] *plaint which was before you, our said barons, in our exchequer aforesaid, by bill between Charles Bonner, our debtor, and John Plaskett, of a plea of trespass upon the case as it is said, which record and process, by reason of our intervening, we caused to come before the lord chancellor of Great Britain and you, the said treasurer and barons, into the chamber of council, called the council chamber of the said exchequer, and judgment thereupon before the said lord chancellor, and you, the said treasurer and barons, is affirmed, as it is said, manifest error hath intervened to the great damage of the said John, &c., we, willing that the said error, if any, be duly amended, and full and speedy justice done to the said parties in this behalf, do command you that if judgment be given thereupon and affirmed, that you send to us distinctly and plainly, without delay, into our present parliament, &c."

A motion was now made, on behalf of the defendant in error, that the writ might be superseded with costs.

In an affidavit sworn in opposition to the motion, the plaintiff in error stated, that he had accepted the bill of exchange on which the action was brought for the accommodation of one Newmarsh; that Newmarsh endorsed it to Bonner without consideration; and that on the 23d of June, bail had been put in on the writ of error, to which bail no exception had been taken.

Mr. *Sugden* and Mr. *Kenyon Parker* for the motion, contended that there

were three grounds on which the writ of error ought to be superseded: First, it was evidently brought for delay; secondly, a writ of error, returnable in parliament, did not lie after judgment of *non pros.* on a former writ of error brought below; thirdly, the recital that the judgment had been affirmed in the *exchequer chamber, was contrary to the fact; and such [*157] a misrepresentation was a sufficient ground for superseding the writ.

Traub v. *Schmidt.*(*a*)

Mr. *Spurrier*, contra:—The court cannot now enter into the merits of the question between the parties; and the allegation of delay is altogether immaterial, since the writ has been issued as of right. It is inaccurate to say that the judgment of *non pros.* on the former writ of error deprived Plaskett of the power of suing out a writ of error returnable in parliament. "A writ of error," says a book of practice, "cannot be brought from the office of pleas into the house of lords *per saltum*; and though it will lie after judgment of *non pros.* in the exchequer chamber, the defendant in error will not thereby be precluded from suing out execution."(*b*) The only effect, therefore, of the course which Plaskett has taken is, that his adversary can sustain no injury by delay, but may still have the fruit of his judgment. The alleged misrecital in the writ could be cured by amendment under the 5 G. 1, c. 13.(*c*) The amendment could be made by the house of lords; and the court of chancery ought not to take upon itself to determine, whether the higher tribunal will permit such an amendment to be made or not.

Mr. *Sugden* in reply contended, that the court, out of which the writ issued, seeing that it contained *statements contrary to the [*158] truth, would supersede it without speculating on the chance of its being hereafter amended; especially, where it was intended as a mere instrument of delay. No injury would be done by superseding the writ, because the party could still have such a writ of error as he was entitled to according to the truth of his case.

THE LORD CHANCELLOR:—The former writ of error having been *non-prossed*, Plaskett had no right to sue out a writ of error, reciting that the judgment had been affirmed in the court of exchequer chamber. He has, therefore, sued out a writ which is not sustainable in its present form. He says that he can amend it; but I must deal with it in its present form, especially as I am satisfied that it is brought for delay.

The writ was ordered to be superseded with costs.

(*a*) 3 Mer. 632. (*b*) Mr. Manning's Practice of the Office of Pleas, 496.

(*c*) The statute enacts, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable."

[*159] *ORCHARD'S CASE.

1828; July 19.

A person having been taken in execution upon a *ca. sa.* within the outer door of the Vice-Chancellor's court, in Lincoln's Inn, while the court was sitting, the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and having examined the officer, discharged the prisoner immediately.

MR. WAKEFIELD, on behalf of a solicitor of the name of Orchard, stated, that Orchard had been this morning taken in execution either in the body of the Vice-Chancellor's court in Lincoln's Inn, or in the space between the outer and the inner doors, both doors being open, and while the Vice-Chancellor, was sitting for the despatch of business. The circumstance was immediately mentioned to the Vice-Chancellor, who was requested to order the discharge of the prisoner forthwith; but his Honor, doubting whether he had jurisdiction, directed the matter to be brought before the Lord Chancellor.

It was admitted that Orchard was not in court for the purpose of professional attendance, or of discharging any professional duty.

Mr. Wakefield, after narrating these circumstances, submitted that every place, in which the judges of the king's superior courts were sitting, was privileged, and that no arrest could be made in their presence or within the local limits of the place where they were administering justice. To permit arrest to be made in the court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal. Sir William Waller's case.(*a*) Lord Coke, in his Third Institues,(*b*) says, "The king's palace at Westminster hath this liberty and privilege, viz. *nullæ citationes aut summonitiones liceant fieri cuicunque infra* [*160] *palatium Regis Westm.* Like privilege hath Westminster Hall, or other places where the king's justices, &c. sit." "No arrest." says Blackstone, "can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting."(*c*) Long's case (*d*) is thus stated: "One Long was arrested in the palace yard, not far distant from the hall gate, the court being then sitting; and being an attorney of the court, he, together with the officer, was brought into court, and the officer was committed to the Fleet, that he might learn to know his distance." *Pigot* v. *Charlewood*,(*e*) *Maule* v. *Grubb*,(*g*) *Williamson* v. *Jaques*,(*h*) *Ex parte Ledwich*,(*i*) *List's case*.(*k*)

THE LORD CHANCELLOR ordered that the officer, who had made the arrest, should immediately attend with his prisoner.

The officer, being on the floor of the court, was examined by the Lord Chancellor. He stated, that he had a writ of *capias ad satisfaciendum*

(*a*) Cro. Car. 373. (*b*) Page 141. (*c*) 3 Black. Com. 289. (*d*) 2 Mod. Rep. 181.
(*e*) Barnes, 200. (*g*) Ibid. (*h*) 3 T. R. 392. (*i*) 8 Ves. 598.
(*k*) 2 V. & B. 373.

against Orchard; that he saw Orchard in Chancery Lane, and hastened to arrest him, but that Orchard, having observed him, ran with all the speed he possibly could, and got within the outer door of the Vice-Chancellor's court, before he could overtake him.

THE LORD CHANCELLOR immediately ordered Orchard to be discharged from custody; and admonished the officer to beware of again acting in a similar manner.[1]

*GRETHAM *v.* BELL. [*161]

1828; July 19.

Where it is necessary to produce a record of the court on the trial of an issue, the party must procure the proper officer to attend with it; and an order will not be made directing the officer to deliver the record to any other person for the purpose of being produced.

AN issue had been directed to be tried at York, in order to ascertain whether the plaintiff was one of the next of kin of an intestate; the defendant, it was admitted, was one of the next of kin.

Mr. *Agar* moved, on behalf of the defendant, that the depositions of the plaintiff's witnesses, sworn in the cause, might be delivered to the clerk of Mr. Serjeant Jones, in order to be produced on the trial, he undertaking to return them to the six clerk.

It was stated, that the production of the original depositions was necessary, in order that the plaintiff's witnesses might be asked whether the signatures to the depositions were in their respective handwriting, and might then be cross-examined on the matters contained in the depositions; and the clerk of Mr. Serjeant Jones was selected, because, the judges having left town, the depositions could not be intrusted to any of their clerks.

As no person appeared to oppose the application, the court assented to it.

The clerk in court, however, refused to deliver up the depositions, until the matter should be again submitted to the court.

Accordingly, on the following day, the motion was renewed; when Mr. *Beames*, for the clerk in court, stated, that no such order as was now asked had ever been *made; that the original records were never [*162] taken out of the custody of the court, or its recognized officer; and that the order usually made in such cases, was, that the officer of the court should attend with the record on having his expenses paid.

Mr. *Agar* replied, that the enormous expense of procuring the attendance of the clerk in court with the record was the cause why the present motion was made, and was a sufficient reason why it should be granted.

THE LORD CHANCELLOR:—It appears that what the court is now asked

[1] Vide *Humphrey* v. *Cumming*, 5 Wend. 90.

to do has never been done, and is contrary to the established usage. The application must be refused.

[*163] DEW *v.* CLARKE.

1828; June 31, August 1, 2, 3, 4, 19, November 1.

A commission of review will not be granted, unless there is clear error in law, or a clear mistake as to fact, in the judgment of the court below, or unless the case involves an important and doubtful question of law, which ought to be decided in the most solemn form.

A will was held to be invalid, on the ground that the testator, though sane in his general conduct, labored under an unsound delusion of mind with respect to his only child.

ELY STOTT died on the 18th of November, 1821, at the age of seventy-two years, leaving a widow and an only child, a daughter. In February, 1821, a commission of lunacy had been issued against him, under which he was found of unsound mind from the 1st of January, 1821. In May, 1818, he had executed a will, by which he bequeathed about 80*l.* a year to his daughter during her life, and an annuity of 400*l.* a year to his widow, and gave the residue (subject to some other legacies, not considerable in amount) to his nephews Thomas Clarke and Valentine Clarke. His property amounted to about 40,000*l.*

The validity of the will was contested by the daughter, on the ground that he was not of sound mind. The alleged unsoundness of mind consisted in a delusion which he had labored under with respect to his daughter from her childhood upwards, considering her, and speaking of her, as a most worthless, vile, and immoral person, and treating her with the greatest harshness and cruelty. The residuary legatees, on the other hand, relied on the general tenor of his life, and imputed to the daughter misconduct which might account for the opinion he entertained concerning her, and his feelings towards her.

The details of the material facts of the case are stated in the judgment of Sir John Nicholls, as reported by Dr. Haggard.

Sir John Nicholl decided against the validity of the will.

[*164] *Upon an appeal to the court of delegates, his judgment was affirmed; but there was a difference of opinion on the bench.

The Clarks now petitioned for a commission of review.

The *Attorney General*, Dr. *Lushington*, and Mr. *Roupell*, in support of the application.

Sir Edward Sugden, Dr. *Phillimore*, and Mr. *Knight*, contra.

THE LORD CHANCELLOR:—The question in this case related to the validity of the will of a person of the name of Ely Stott, which was impeached on the ground of the alleged unsoundness of the testator's mind at the time

when it was made. The cause came on, before Sir John Nicholls, in the prerogative court of Canterbury. A great body of evidence was adduced: the question was argued at great length; and Sir John Nicholl, who appears, by the printed report of his judgment,(*a*) to have given most careful attention to the subject, ultimately decided against the validity of the will. The parties, against whom that decision operated, appealed to the court of delegates; the question was again agitated before the delegates upon the same evidence, and was argued most elaborately. The judges of that court took time to consider of their judgment, and they ultimately confirmed the decision of the court below.

Under these circumstances, the parties, against whom the decision was pronounced, have petitioned the king *in council for a commis- [*165] sion of review: the petition has been referred to me, in order that I may advise his majesty upon the subject; and, according to the course which has always been adopted in cases of this kind, counsel have been heard in support of the petition and against it, so that the whole merits of the case have been again investigated before me. The evidence is most extensive; the case was argued for several days very elaborately and with great ability; and the question is, whether, under all the circumstances, I should be justified in advising his majesty to accede to the prayer of the petition.

A commission of review is not a matter of right: it is an application to the indulgence of the crown, and it is either granted or withheld, according to the discretion of the crown; but, of course, in the exercise of that discretion, the crown would take into consideration the end and object in view. I have been desirous of ascertaining the principles upon which my predecessors have acted in cases of this kind: and the rule is laid down with great distinctness in *Eagleton* v. *Kingston*,(*b*) by my very learned predecessor. In that case Lord Elden refers to the opinion of Lord Rosslyn, as expressed in a previous case reported in 4 Vesey, and he adopts Lord Rosslyn's opinion. Lord Rosslyn, as far as relates to questions of fact, was of opinion that the Lord Chancellor would not exercise a sound discretion in recommending the crown to grant a commission of review, where the question turned upon the matter of fact, unless it was a case of "very gross miscarriage" in the court below. In the certificate which Lord Eldon returned after his judgment in *Eagleton* v. *Kingston*, he states to the crown the principles and grounds of his decision. If there *has been error in law; if there [*166] is an important and doubtful question of law, which it is fit to have settled in the most solemn form; if there has been a clear mistake as to the fact,—in these cases, and in these cases only, he thinks the Chancellor would be justified in recommending the crown to grant a commission of review. Such are the principles upon which my predecessors have acted; and it is

(*a*) Haggard's report of the judgment in *Dew* v. *Clarke*. (*b*) 8 Ves. 438, 474.

quite impossible, considering the importance of putting an end to litigation, not to subscribe to the principles so laid down.

Now, in this case, I do not find any error in law: I do not find any doubtful or important question of law, which requires to be decided in any solemn form. The only point of law, which has been agitated, has arisen out of an expression made use of by the learned judge in the court below. He speaks of *partial insanity:* and it was contended at the bar, that a case of partial insanity would not be a sufficient ground to lead a court to set aside, or to justify a court in setting aside, a will; and that the doctrine of partial insanity is not known to the law of England. I think I am stating correctly the argument of counsel with respect to this point, according to the apprehension which I entertained of it, at the time when the term *partial insanity* was reiterated, over and over again, as expressing the ground of Sir John Nicholl's judgment. But I think the argument founded upon that phrase proceeds upon a misapprehension of what was meant by the learned judge who occasionally used it. I have read his judgment with great attention, and I collect from it that his meaning is this: that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects. It seldom happens, he says, that a person who is insane, displays that insanity with reference to every [*167] question and every subject: it *shows itself with reference to particular subjects, and sometimes with reference to only one individual subject; it sometimes displays itself with reference to one subject very decidedly, and very generally, perhaps, with reference to other subjects. All that the learned judge meant to convey was, that it was no objection to the imputation of unsoundness, that it manifested itself only, or principally, with reference to one particular question or one particular person: and he illustrates his position by a variety of cases, some of them of public notoriety and known to us all. This construction does not rest on any general reasoning, because, for the purpose of avoiding misapprehension, and as if his attention had been directed to the very point, he himself, in the course of his judgment, explains in distinct terms what he meant by the term *partial insanity.* "It was said," he observes, "that partial insanity was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used that term. It was not meant that a person could be partially insane and sane at the same moment of time; to be sane, the mind must be perfectly sound, otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. In that sense the very same term is used by no less an authority than Lord Hale," and then he sets out at length the passage from Hale. I think, therefore, the learned judge has sufficiently explained what he meant by the occasional use of the term *partial insanity;* and with the explanation he has thus in terms given, and with the whole of his argument, and the illustrations he has used, and the cases to which he has referred in support of that argument, I confess I

entirely agree. Therefore, upon that which seems to me to be the only point of law,—the only thing like a question at law,—which was raised, it does not appear to me there has been any *error or any mistake in [*168] the court below; and therefore, there is no reason, on that ground, why a commission of review should be granted.

We next come to the question of fact. During the argument, a great part of the evidence was read by the counsel at the bar, according to the different views of the case which they took. I not only attended most minutely to the evidence as it was stated, but I endeavored to enter into the minds of the different gentlemen, in their application of that evidence to the case and to the arguments which they addressed to the court. I have since carefully looked over the whole of the evidence; and the result upon my mind is, that, had I been sitting as a judge in the court of delegates, I should in all probability have come to the same decision at which those learned persons have arrived. I do not feel, after the various discussions which this case has undergone, and the minute investigation of the evidence upon three different occasions, that I am now called upon to go through it in detail; and if I were to take a merely partial view of it, I might be liable to misinterpretation, and the grounds of my decision might not be distinctly understood. I say that I am satisfied with the result upon the evidence as to the question of fact; namely, that this gentleman, at the time when he made this will, was in an unsound state of mind.

It is not necessary for me to go even so far, according to the principle to which I have adverted, as laid down by Lord Eldon. If I really brought my mind to this state, that I could not take on myself decidedly to say that a distinct error, a clear and manifest error, had been committed, with respect to the conclusion of fact, I should not be justified in advising the king to grant this commission of review.

*But, though I do not think it necessary to go into the particulars [*169] of the evidence, I feel myself called upon to say a few words upon that portion of the evidence upon which so many observations were made—I do not mean to say improperly made—to the disadvantage of the character of Mrs. Dew. I am desirous, therefore, of adverting to that part of the evidence, for the purpose of showing the impression which I entertain with respect to it. It was alleged that this lady was dismissed from a school at Hackney, kept by Mrs. Rivers, in consequence of some very indecent and improper conduct; she was also stated to have been dismissed from another school at Hampstead, kept by Mrs. English, for conduct of a similar description; and it was contended that the impression made on the mind of Mr. Stott, in consequence of the supposed infamy of her conduct, had led to all those circumstances which ultimately produced the disposition of his property contained in the will in question. That effect of it I am not at present considering: at the same time, I must observe, that, in looking minutely at this evidence, I see sufficient to satisfy my mind, that the impression on Mr. Stott, unfavora-

ble to the character of his daughter, bears a date considerably anterior to the period when she first went to the school of Mrs. Rivers.

Now with respect to the evidence of the conduct, or supposed conduct, of the daughter at these two schools, how does the case stand? Mrs. Rivers herself is examined; and she states, that she does not recollect what it was that led to the dismissal or removal of the daughter from her school. It appears to me impossible to suppose, that, if the conduct had been of such a nature as that which is imputed, it must not have left so strong an impression on the mind of Mrs. Rivers, as to have rendered it impossible that she [*170] should not have recollected what *it was. Miss Sarah Desormeaux lived at that time at Hackney. It is stated in the judgment of Sir John Nicholl, that she was a schoolfellow of Mrs. Dew: I think that was not the case; as I collect from the evidence, she was at some other school at Hackney; but she was in the habit of meeting her every week, every half-holiday, at her mother's house, and they were on terms of the greatest intimacy. It seems impossible, therefore, that Miss Desormeaux should not have been enabled to have stated the supposed cause of Miss Stott's dismissal, if, in point of fact, such a cause had existed. The misconduct of her friend must have made an impression so strong upon her mind,—it was a circumstance from its nature of such a character,—as to render it impossible she could have forgotten it. According to my apprehension and my feelings, therefore, there is the negative evidence of Mrs. Rivers, and there is the negative evidence of Miss Desormeaux, neither of them having any recollection of the alleged fact. The only evidence is that of Mrs. Desormeaux, which, as far as it relates to that point, is not admissible in a court of justice; for it is mere heresay evidence of what she was told by Mrs. Rivers. I admit it may be made use of in the manner in which it was put by Dr. Lushington, namely, to show, that, if Mrs. Desormeaux was deceived, the father too might have been deceived by similar representations; and, therefore, that his conduct towards his daughter does not justify the conclusion of insanity, since he may have merely made a mistake with respect to the fact, and then acted upon the assumption of the fact, which turned out to be incorrect. In that view of the case, Mrs. Desormeaux's evidence might be used; but where the question is as to the character and conduct of Mrs. Dew, Mrs. Desormeaux's evidence cannot be received consistently with any rule of law.

[*171] *Mrs. Desormeaux says, she heard the account from Mrs. Rivers: I doubt her recollection; I doubt the accuracy of it. I think it probable,—not merely possible,—but probable, that she has confounded what afterwards took place at the school of Mrs. English, with that which took place at the school of Mrs. Rivers.

It is to be observed, that, very shortly after this period, she was detached from all communication with Mr. Stott's family, and possibly from all thought concerning them; and that her recollection with regard to these transactions was revived at a distant period of time, with nothing to carry on the chain;

so that it is not extraordinary that she should have confounded one of these matters with the other. She refers to two letters; a letter written by Miss Stott, and the note of her answer to that letter, in confirmation of the correctness of her evidence. I have looked at these letters, and have read them with attention; and, far from confirming her evidence, I think they tend to a directly contrary conclusio , and are irreconcilable with the supposed case. According to the inference which I draw from these letters, it appears to me, that the imputation against Miss Stott was some failing as to temper, something connected with that sullenness and obstinacy which is imputed to her, rather than an offence of the character and nature which is now suggested. I think, therefore, and I am anxious to state it, that what is supposed to have passed at the school of Mrs. Rivers, is totally misapprehended.

With respect to Mrs. English, her evidence is distinct: she has a recollection of the transaction. Miss Stott, at that time, was only about thirteen years of age: and what is the offence with which she is charged? *The imputation is, that she had been guilty of some libidinous con- [*172] duct, and had used libidinous expressions. What is the evidence? Mrs. English says she was displeased with her for making use of some indelicate expressions to some of her schoolfellows: she considered the offence a trifling matter; and being cross-examined as to whether or not it did not go further than mere indelicacy, she denies it in distinct and positive terms. Now, the circumstance of this young girl, of thirteen years of age, repeating to her schoolfellows expressions which possibly she had casually heard, has been made the foundation of attacks upon her character, which, I confess, when I listened to them, filled me with grief; though, at the same time, I felt that counsel were justified, in discharge of their duty, in presenting to the court the view they took of the subject. It appears to me after the fullest consideration, that all the charges against Miss Stott resolve themselves simply into this, that, at the age of thirteen, she, upon one occasion, made use, at the school, of some indelicate expressions to some of her schoolfellows.

I have only, therefore, now to repeat that it does not appear to me that there has been any error in law in this case; and, further, according to the best view I am able to take of the evidence, I can go so far as to say, that, if I had been in the first instance called upon to decide as to the question of fact, I think that I should have decided in conformity with the decision pronounced by Sir John Nicholl. Under these circumstances, it is my duty to recommend his majesty not to grant this commission of review.

*173] *ATTORNEY GENERAL v. HARLEY.

1828; August 6, November 10, December 18.

A testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directs her jewels to be sold; afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds: the testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed: Held, that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were to be sold, and did not pass to B.:

That the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls.

A TESTAMENTARY paper executed by Ann Newton, which appeared to have been made at different times, contained, under the date of the 12th of March, 1806, the following bequest:—"All my plate and jewels to be sold to pay my debts, except Lady Mary Duncan's ring of Cleopatra, set round with diamonds, which I desire may be returned to her ladyship; and the remainder of my rings, and all my trinkets, necklaces of every description, pearls, garnets, cornelians, and watches, to be sent to my three cousins at Bath, with all my unmade muslins, silks, and laces; and my executors will see this done with honorable integrity."

Under the date of May, 1811, was this clause: "All my laces, trinkets of every denomination, (my jewels excepted,) and my unmade muslins, I give to my niece Mary Ann Catharine Bagshaw."

In a subsequent part of the paper, and under the same date, these words occurred: "My loose furniture, plate, jewels, and linen to be sold."

Another testamentary paper, dated the 5th of June, 1811, contained
[*174] the following bequest:—"To my *niece Mary Ann Catharine Bagshaw, all my laces, trinkets, pearls, unmade muslins, one bandeau of diamonds, and a pair of small ear-rings, which my dear mother gave me, and also one pair of larger stump ear-rings, which belonged to our family; my three pearl ear-rings, one rose diamond ring, one topaz ring, given me by my uncle General Caldwell, one brilliant diamond ring inclosed with my dear mother's hair; one ring containing several links of gold, and a small rose diamond in the centre; my father's picture, and my dear mother's hair set with large pearls, and the initials C. B. worked in small pearls."

By the decree the master was directed to inquire, among other things, what jewels, rings, trinkets, and necklaces, pearls, garnets, cornelians, and watches, the testatrix died possessed of, and to distribute them among the persons entitled according to the directions contained in her testamentary papers.

The master set forth a list of these articles in the schedule to his report,

and of those he certified that the following were to be sold:—"No. 1, diamond necklace and cross; No. 3, diamond and colored stone head ornament; No. 7, antique ring set with diamonds; No. 9, emerald ring set with diamonds; No. 26, a pair of brilliant diamond ear-rings; No. 29, brilliant flower pin; No. 30, a diamond hooping ring; No. 37, hair locket set with diamonds."

To Miss Bagshaw he allotted:—No. 2, diamond bandeau; No. 8, diamond ring inclosed with hair, (mother's,) and one ring containing several links of gold; No. 10, one seal in case; No. 11, two ivory fans; No. 12, two pearl pins; No. 19, small locket hair set with pearls; No. 22, pearl necklace; No. 23, gold chain; No. *24, pair of gold bracelets, with topaz clasp [*175] set with pearls; No. 25, crystal and pearl armlets, bracelets and cross; No. 27, pair of large stump ear-rings (diamond); No. 28, small ditto; No. 31, three hoop rings; No. 32, one ring set with pearl; No. 35, pair of string pearl ear-rings; No. 36, pearl cross and bow; No. 38, ruby ring set with pearl; No. 39, topaz ditto, ditto; No. 41, Scotch pebble ear-rings and brooch."

To Lady Belmore and the two Misses Caldwell (who were the persons described in the will as the testatrix's three cousins at Bath) the following articles were allotted:—"No. 4, enamelled watch and chain; No. 5, two gold watches and one seal; No. 6, two metal ditto; No. 13, garnet necklace ear-rings and cross; No. 14, cornelian hoop set with pearls; No. 17, gold chain with cornelian medallion set with pearls; No. 18, cornelian brooch; No. 20, cornelian ear-rings set with gold. No. 21, cornelian brooch and locket; No. 33, Scotch pebble necklace; No. 34, mock pearl ditto and clasp."

The executrix having petitioned that the master's report might be confirmed, Lady Belmore and the Misses Caldwell presented a counter petition, insisting that the report was erroneous, in so far as it found that the articles numbered 1, 7, 9, 26, 30, and 37, were directed by the will of the testatrix to be sold, and that those numbered 22, 23, 38, and 39, were given to Miss Bagshaw; and they prayed a declaration, that the several articles were bequeathed to them.

The petitions were heard before the Master of the Rolls on the 31st of March, 1828, when his Honor declared, that Lady Belmore and the Misses Caldwell were entitled to all the testatrix's necklaces of every description and to all her rings except those specifically given to Lady Mary Duncan and Miss Bagshaw.

*From this order the relator appealed. [*176]

The effect of the declaration made by the Master of the Rolls was to exclude from the jewels that were to be sold, the diamond necklace and cross, (which was stated to be worth more than 1000*l.*,) the antique ring set with diamonds, the emerald ring set with diamonds, and the diamond hoop ring: and the principal question argued on the appeal was, whether these articles were to pass under the bequest of jewels, or under the bequest of rings and necklaces.

The *Attorney General*, Mr *Sugden*, and Mr. *Bethell*, for the relators:—

The first direction of the testatrix is, that her jewels, with the exception of one ring set with diamonds, should be sold to pay her debts; and she then gives the remainder of her rings and necklaces of every description to her three cousins. This second bequest cannot be meant to revoke or abridge the direction which immediately precedes it, and must be considered as a disposition merely of rings and necklaces not coming within the description of jewels. The testatrix had many such rings, and, besides the diamond necklace, she had a pearl necklace, a coral necklace, an amber necklace, and a garnet necklace: she had no jewels except such as were in the form of ornaments for personal use; and the bequest of jewels will have no operation, unless the words descriptive of personal ornaments be confined to articles which are not jewels.

If the principle of construction adopted by the Master of the Rolls be sound, it ought to have been carried still further; if jewel rings are to pass by the gift of rings, jewel trinkets ought also to pass by the gift of
[*177] trinkets; then the diamond and colored stone head ornament *(No. 3,) the pair of diamond ear-rings, (No. 26,) the brilliant flower pin, (No. 29,) and the hair locket set with diamonds, will go either to the three cousins or to the niece; and there will remain nothing to give effect to the bequest of jewels.

It is certain that the testatrix did not mean to include jewel trinkets under the term trinkets; for, having given all her trinkets to Miss Bagshaw, she afterwards gave specifically to her certain ear-rings, which are diamond ear-rings.

Even if jewel rings and jewel necklaces would have passed under the first disposition considered by itself, the testamentary writing of May, 1811, will either vary the construction, or, to a certain extent, revoke the bequest. In May, 1811, the testatrix gives to her niece all her trinkets (except her jewels,) and she directs her jewels to be sold. She considered, therefore, that she had not given her jewels to her cousins; and even if they would have taken them under the previous bequest, that bequest would be revoked by this subsequent direction.

Mr. *Bickersteth* and Mr. *Simpkinson*, for the executrix, supported the appeal.

Mr. *Walker*, for Lady Belmore, and the Misses Caldwell, in support of the order of the Master of the Rolls:—"The remainder of my rings," in the first disposition, must mean all the testatrix's rings, except the one which she had before given to Lady Mary Duncan; and to say that the most valuable species of her rings are not included in this bequest, would be to put a very extraordinary construction on very plain words. Even if
[*178] *the word *jewels* could be construed as comprehending rings set with diamonds, the subsequent gift must control the preceding; and all her rings, as well as all the other articles which she enumerates in the bequest to her cousins, are excepted from the direction that her jewels should

be sold. The phrase "remainder of my rings," must refer to the particular ring which had been just mentioned; and, as that was a diamond ring, the testatrix must have meant to include diamond rings in the general disposition of her rings.

No words can be conceived more comprehensive than "my necklaces of every description." The testatrix, when she used them, must have had in her contemplation the diamond necklace, which was much more valuable than all her other necklaces; and to hold that it does not pass by them, will be to substitute conjecture for construction.

It has been said, that if rings and necklaces include jewel rings and jewel necklaces, then trinkets must also mean jewel trinkets. That is a mistake: rings are spoken of with express reference to a diamond ring; and, with respect to necklaces, the words are, "necklaces of every description;" whereas the trinkets are mentioned without the addition of words of equally extensive import. The bequest of the rings and necklaces, therefore, may include jewel rings and jewel necklaces, though the bequest of trinkets does not extend to jewel trinkets.

The effect of the disposition of May, 1811, is merely to take away from her cousins some of the articles which she had before bequeathed to them, and to give these articles to Miss Bagshaw. It does not revoke or alter the disposition of her jewels, rings, and necklaces.

*Mr. *Sidebottom*, for Miss Bagshaw. [*179]

The only case referred to in the argument was *Cavendish* v. *Cavendish*.(a)

November 10.—The Lord Chancellor:—In the first testamentary paper, Mrs. Newton directs all her plate and jewels to be sold, with the exception of a single ring, which she described as a ring set round with diamonds.

The exception shows that she considered diamond rings, or rings set with diamonds, as jewels, and that, if not specifically excepted, they would pass under her bequest of jewels. When she gives, immediately afterwards, the remainder of her rings to her three cousins, she must have meant the remainder of her rings not falling within the description of jewels. The term "remainder" has reference to the whole of the previous disposition. The rings which come within the description of jewels, namely, diamond rings, and rings set with diamonds, are to be sold, with the exception of one particular ring, which is to be restored to Lady Mary Duncan: the remainder of the rings the three cousins are to take.

The testatrix had a very valuable diamond necklace and cross; and one question is, Whether, under the subsequent disposition of "all my trinkets, necklaces of every description, pearls, garnets, cornelians, and watches," that particular necklace and cross was intended to pass. She has previously dis-

(a) 1 Cox, 77.

posed, in the most distinct terms, of all her jewels, with one single [*180] exception, including among her jewels, her diamond *rings; and it is impossible to suppose that she could, immediately afterwards, intend that, under the words "trinkets and necklaces," this diamond necklace should pass. It is further to be observed, that, if she intended the diamond necklace to pass, she must be presumed to have intended also, that all her trinkets coming within the description of jewel trinkets, should pass by that clause; and the consequence would be, that if all her jewel trinkets, and this particular necklace, were to go to her three cousins, scarcely any thing would remain to be sold under the description of "all her jewels." Besides, looking at the nature of the property, and the description of the legacies in this will, it does not seem probable that the testatrix would have disposed of so valuable an article by such general words, combining it with other necklaces of inferior value.

For this reason, my opinion on the construction of the testamentary disposition of the 12th of March, 1806, is, that the diamond necklace and cross were intended by the testatrix to be sold.

The next testamentary bequest, which affects the question, bears date in May 1811: "All my laces," says the testatrix, "trinkets of every denomination, (my jewels excepted,) and my unmade muslins, I give to my niece Mary Ann Catharine Bagshaw. Afterwards, in the same month, she adds, "my house, furniture, plate, jewels, and linen, to be sold." Having before given her trinkets (that is, according to my construction of the previous bequest, her trinkets not being jewel trinkets,) to her three cousins at Bath, she, by this subsequent disposition, gives all her trinkets to her niece; that is, those trinkets which would have passed under the former gift to her three [*181] cousins. In the *former bequest she has given all her trinkets generally, without stating any exception; because the exception of the jewels followed from the disposition of the jewels which immediately proceeded. In this latter bequest she has not previously mentioned the jewels; and, therefore, as her meaning was that those trinkets only should pass which were not jewels, she excepts the jewels by express words.

It seems to me a confirmation of the construction I have adopted, that, when she afterwards, in the same month, directs her jewels to be sold, she does not make an exception of this valuable necklace and cross.

In another testamentary paper, executed in the following month, the testatrix gives "all her laces, trinkets, pearls, unmade muslins," and various specific articles, to Miss Bagshaw. The gift of the laces and trinkets, which had been before bequeathed to Miss Bagshaw, is merely a repetition of the former legacy. The testatrix, indeed, does not say here as she has said before, "my jewels excepted;" but, as in the words immediately following she gives Miss Bagshaw particular jewel trinkets, it is evident she did not mean to include them in the prior bequest, and merely intended to repeat and confirm the former disposition of her trinkets. The jewel ornaments, which are specifi-

cally bequeathed to Miss Bagshaw, must, of course, be excepted from the general mass of jewels which is directed to be sold.

On the whole, looking at these three testamentary papers, I come to the conclusion (in a question of this kind, it is perhaps a conjecture rather than a conclusion,) that, with the exception of Lady Mary Duncan's ring, and the jewel ornaments specifically given to Miss Bagshaw, all the rings which come within the *description of jewel rings or diamond rings, [*182] together with the diamond necklace and cross, are to be sold.

It was mentioned that Miss Bagshaw claimed the pearl necklace under the general bequest of pearls in the testamentary paper of the 5th of June, 1811, and that it had been allotted to her by the master. On the other hand, Lady Belmore and the Misses Caldwell contended that it passed to them under the words "necklaces of every description" in the first bequest, and that the gift in their favor was not in this respect affected by the subsequent bequest of the testatrix's pearls to Miss Bagshaw.

December 19.—THE LORD CHANCELLOR:—I think the pearl necklace goes to the three cousins at Bath. Necklaces of every description and pearls are mentioned in the first instrument; under the term "necklaces," a pearl necklace would pass; and as pearls are mentioned in the very same bequest, the testatrix did not intend to include pearl necklaces under the term "pearls." Therefore, when in a subsequent testamentary paper she gives her pearls to Miss Bagshaw, without making any mention of necklaces, she means to alter her disposition only of what she had before included under the term "pearls," and not her disposition of her necklaces; and the disposition which is made of her pearl necklace by the first testamentary paper is not affected by this subsequent bequest.

In the last testamentary bequest to which I have alluded, after she has given her pearls generally, she also gives specifically a pearl ring. Therefore, she did not think that by a gift of pearls generally she had given such articles as pearl rings or pearl necklaces.[1]

[1] It would be satisfactory to know, what had been the previous proceedings, by which the questions discussed and decided, in the above case, had been presented to the court. How the attorney general became plaintiff—how the court became possessed of the cause. The principle to be deduced from the case seems to be this, that where there is a specific enumeration of articles of great value in a bequest; articles of equal, or greater value, will not pass under a general bequest of articles *ejusdem generis*.

[*183] *IN THE MATTER OF JENKINS.

1828; August 13.

A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock, which was standing in the name of a trustee for her; this stock was, under an order made in the lunacy, transferred into the name of the accountant general, in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs; the lunatic died, leaving his wife him surviving: Held, that the stock had been reduced into the possession of the lunatic, and that the wife was not entitled to it by right of survivorship.

A MARRIED woman was absolutely entitled to stock which stood in the name of a trustee, and was not affected by any marriage settlement; and her husband having been found a lunatic, and she having been appointed the committee of his person and estate, this stock was, under an order made in the lunacy, transferred into the name of the accountant general in the matter of the lunacy. The dividends had been applied to the maintenance of the lunatic; and, under an order obtained by the wife, part of the *corpus* had been sold out for the payment of costs, which the master had found could not be otherwise provided for. The husband died, leaving his wife surviving; and she now presented a petition, praying that the residue of the stock might be transferred to her, as belonging to her by right of survivorship.

Mr. *Treslove*, for the petition:—This stock was never reduced into possession. If it had remained standing in the name of the trustee, no question could have arisen: can the substitution of a public trustee for a private trustee,—can the transfer into the name of the accountant general,—operate as a reduction into possession, so as to give the personal representative of the husband that fund, which, otherwise, must have been the wife's? In *Bond* v. *Simmons*,(*a*) where a legacy given to a married woman had been invested in stock in the name of the accountant general, Lord Hardwicke held [*184] that the wife, having *survived her husband, was entitled, not only to the principal, but to the arrears of dividends which had accrued due in the life of the husband. In *Macauley* v. *Phillips*,(*b*) a residue belonging to the wife had been laid out in the name of the accountant general; and Lord Alvanley came to a similar conclusion in favor of the wife surviving. "It would be most extraordinary," says that judge,(*c*) "if the court, where it declares the property to be the property of the husband and wife only in her right, in order to give her a right to a settlement of it, should take it from the trustee in order to give it absolutely to the husband; that the equity should be gone, and the husband have a greater interest in it, when in court, than while in the hands of the trustee. It is not necessary to argue much, that that could not have been the doctrine of the court; and in *Bond* v. *Simmonds*, Lord Hardwicke says, 'The payment into court makes no al-

(*a*) 3 Atk. 20. (*b*) 4 Ves. 15. (*c*) 4 Ves. 18.

teration in the right and property of the parties.' . . . Even if the trustee after a bill filed, and particularly after a decree for a proposal, was to pay, the court would hold it a payment by wrong, and would set it aside."

The transfer into the name of the accountant general, therefore, does not constitute a reduction into possession by the husband. To reduce a *chose in action* into possession, the husband must do some act; here he never did and never could do any act with that view; and it is questionable whether any act of the committee could take away the right of the wife. The cases referred to show that, if the committee had filed a bill against the trustee, and the stock had in that suit been transferred into the name of the accountant general, the right of the wife would have remained *unim- [*185] paired. It is not the habit of the court to permit any thing done in lunacy to alter the rights of the parties.

Mr. *Pemberton*, contra:—As long as a *chose in action* of the wife remains outstanding in the name of a trustee for her, or of a trustee for her and her husband, she retains the legal right attached to her chance of survivorship; and it may, perhaps, be admitted that it does not make any material difference whether it is a private individual, or the court and the accountant general, who is the trustee. In *Bond* v. *Simmons*(*a*) and *Macauley* v. *Phillips*(*b*) the court took possession of the fund simply as assets, to which the wife, or the husband in her right, was entitled. In the former case Lord Hardwicke says,(*c*) "The direction here was not for the benefit of the husband, or to alter the right and property of the parties, but only to ease the executor of the burden; and ordering the accountant general to lay it out in this manner, was to secure it against the husband, subject to the further order of the court." The observations of Lord Alvanley in *Macauley* v. *Phillips* amount merely to this—that the equity of the wife to a settlement is not destroyed by the circumstance that her fund has by means of a suit been secured in that court, whose special province it is to enforce her equitable rights. Here the case is altogether different. The Lord Chancellor, acting for the lunatic, has taken possession of the fund for the use of the lunatic; it has been dealt with as the property of the husband; it was only as the property of the lunatic that the Lord Chancellor had any jurisdiction to make an order in lunacy concerning it, or that the accountant general had *any authority to receive it. For whom except the lunatic can [*186] the accountant general be a trustee, where a fund is transferred into his name in the matter of a lunacy? Suppose that the fund had been transferred first into the name of the committee, and then by the committee to the credit of the lunacy, would not that have been a reduction into possession? and must not the result be the same, if the committee procures the trustee to make a transfer at once, and without circuity, into the name of the accountant general? If the trustee had refused to transfer, the court could not have com-

(*a*) 3 Atk. 20. (*b*) 4 Ves. 15. (*c*) 3 Atk. 21.

pelled him to do so by any proceeding in lunacy; and a bill must have been filed. The right of the wife would have been preserved. But the person who has the *chose in action* of the wife in his hands may always defeat the right attached to her chance of survivorship, and also her equity, by parting with the property to the husband or those who represent him; and the law will not listen to any complaint on her part that such a course has been taken. Here the wife was herself the party who obtained the order for bringing the fund into court. It is true that, as between the real and personal representatives of the lunatic, the court will not alter the nature of the lunatic's property; but what has that to do with the present question? Can it be thence inferred that the legal rights of the lunatic are not to be enforced, so as to complete any inchoate title which he may have? Is it not the duty of the committee to reduce into possession property which the law gives to the lunatic, but which, if not reduced into possession, will, upon his death, belong to another person? The proposition on the other side amounts in fact to this,—that the *chose in action* of the wife of a lunatic cannot, in the view of the law, be reduced into possession; for there can be no reduction into possession on behalf of a lunatic, if this stock is to be considered as not reduced into possession.

[*187] *Mr. *Treslove*, in reply:—How can there be a reduction into possession by a person who cannot act? The transfer into the name of the accountant general was only for the convenience of administration; if the wife had asked that it should be without prejudice to her right, the order would have been made with that qualification: and it therefore could not be the intention of the court that her right should be affected. The fund must be considered as in her own possession, and as having been, by her, applied in part for her husband's benefit.

The Lord Chancellor:—The mode in which this stock has been dealt with amounts to a reduction into possession by the husband. Payment by the trustee to the lunatic or to the committee would have been a reduction into possession: payment into court to the credit of the lunacy is equally a reduction into possession for the lunatic, and for the lunatic only. The Lord Chancellor, acting for the lunatic, has taken possession of the fund for the lunatic's benefit—has exercised dominion and control over it—and has administered it on behalf of the lunatic.

END OF PART I.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

GRANT *v.* GRANT.

1827; December 18. 1828; August 16.

A writ of *ne exeat regno* will not be discharged, nor will the recognizances of the sureties be vacated because the bill has been subsequently amended under a common order, where the amendments do not vary the substance of the plaintiff's case.

IN this case a writ of *ne exeat regno* having issued, marked for 13,500*l.*, the defendant moved, first upon affidavits and afterwards upon his answer, to discharge it. The writ, however, was sustained, though the sum, for which it was marked, was reduced to 6,500*l.*; and bail had entered into the usual recognizances. The details of the case, with the argument and judgment on the motions, are reported in a former volume.(*a*)

The plaintiff moved before the Vice-Chancellor for leave to amend the bill without prejudice to the writ. His Honor refused to make any special order, but left the plaintiff to take, as of course, the common order to amend, if he thought he could do so with safety.(*b*)

*An order to amend having been taken in the common form, the [*190] bill was amended. The amendments did not alter the substance of the case. They corrected some of the details; explained more fully the circumstances of some of the transactions; controverted some of the allegations in the answer; and brought formal parties before the court.

A motion was now made that the writ of *ne exeat regno* might be discharged and the recognizances entered into by the defendant's sureties vacated.

Mr. *Horne* and Mr. *Pemberton*, for the motion:—If an amendment is made after an injunction issued, the injunction is gone, unless the order provides that the amendment shall be without prejudice to the injunction. The same rule must apply to the harshest of all injunctions—the injunction to restrain a defendant from going abroad by means of a writ of *ne exeat regno*. If an amendment becomes necessary, the plaintiff is bound to make a special case,

(*a*) Vol. III. 598. (*b*) 2 Sim. 14.

so as to obtain from the court leave to introduce the proposed amendment without prejudice to the writ. For, if that be not the rule, then he must be held to be at liberty to introduce, under an order of course, what amendments he pleases, retaining at the same time the benefit of the liability of the sureties; and in this way that liability might be completely altered. They enter into recognizances with a view to one state of circumstances and one form of record: are they to remain subject to this liability, when the plaintiff has chosen to alter these circumstances, and to give the record an entirely new form? In the original bill, Lindo, the trustee of the bonds on which the plaintiff's demand arose, was stated to be out of the jurisdiction of the court:
[*191] according to the doctrine of *Ray* v. *Fenwick*,(a) *in which Lord Thurlow refused a writ of *ne exeat regno* to the assignee of a bond, because there was no representative of the original obligee before the court, no decree could be made in a suit so framed, and the sureties might say,—we will without scruple enter into recognizances for the defendant in a suit in which a decree against him cannot be pronounced. Now the constitution of the suit is altered; Lindo is stated to be dead, and his personal representatives are made parties: and, by this change, the situation of the sureties, if their recognizances are still to be in force, is materially varied.

A court of equity, with regard to bail on writs of *ne exeat regno*, acts by analogy to the proceedings at law. *Pannell* v. *Taylor*.(b) At law a very slight variation between the declaration and the writ discharges the bail; and the court will not in such cases allow the declaration to be amended. *Levett* v. *Kibblewhite*.(c)

Mr. *Sugden*, and Mr. *Macarthur*, contra:—An injunction is only till the further order of the court; and therefore, when an order to amend is obtained, the injunction is gone, unless expressly saved. But no such qualification or limitation is to be found either in the writ of *ne exeat regno* or in the recognizances: the engagement of the sureties is, that the defendant will not go or attempt to go beyond seas without the leave of the court. There is therefore no ground for contending that the mere fact of amending, without regard to the nature of the amendment, entitles the party to have the writ discharged and the recognizances vacated. This very motion shows that the
[*192] analogy of injunctions is not applicable. Had the *question been as to an injunction, the amending of the bill would have annihilated the injunction, unless saved by the order; and the defendant would not have had occasion to make any special application. But it is admitted that the writ and recognizances are still in force, notwithstanding the amendment; and the defendant is forced to call for a special interference of the court, in order to discharge them.

We admit that there is no common form of an order to amend without prejudice to the writ of *ne exeat regno*. There is no such common form, be-

(a) 3 Bro C. C. 25. (b) 1 Turn. & Russ. 103. (c) 6 Taunt. 483.

cause amendment does not in itself prejudice the writ. We could not obtain special leave to amend, because the Vice-Chancellor thought, that, being at liberty to amend under a common order, we ought to be left to take the chance of what the effect of the amendment might be.

The question, therefore, is, whether the amendments are of such a nature as to entitle the defendant to have the writ discharged. If the case made by the amended bill were materially different from that on which the writ originally issued, the defendant would have a right to complain. But here the substance of the case is in no respect altered. The instruments on which—the transaction out of which—the plaintiff's claim arises, are the same in the amended as in the original bill. The amendments relate merely to matters of form and of pleading.

At law, it is not every variance or amendment which will discharge the bail, but only such variances or amendments as affect the essence of the case; as, for example, changing the nature of the action, or bringing forward a new cause of action.

*Mr. *Heald*, for the sureties. [*193]

1828; *August* 16.—THE LORD CHANCELLOR:—It was contended that the writ of *ne exeat regno* ought to be discharged, because, since the writ issued, the bill has been amended. No decision was adduced in support of the argument: but it was said that, by analogy to the practice in courts of law, with regard to bail, the sureties ought to be discharged, if the party complaining varied his demand either in substance or in form. It appears to me that there is so wide a difference between courts of law and courts of equity in the amendments which the practice of each permits, that this supposed analogy cannot affect the question. In courts of equity parties are permitted to make alterations and amendments in the record, far beyond the limits which are prescribed by courts of law; and with reference to the peculiar nature of suits in equity, such alterations and amendments are often necessary in order to provide for the changing accidents of human life, and to prevent a failure in the administration of justice.

If the amendments had introduced matter substantially new, there might have been ground for the application: but the amendments here, though long and numerous, do not appear to me to bring forward matters which can properly be called new.[1] Parties have been added, but they are merely formal parties, and are the personal representatives of persons who had been or ought to have been defendants to the original bill. Other amendments were rendered proper by the answer, and have been introduced for the purpose of *meeting the statements made by the defendant. Looking at [*194]

[1] Vide *Ellice* v. *Goodson*, 3 Myl. & Cr. 653, 660.

the nature of the amendment, there is no ground for discharging the writ and vacating the recognizances.[1]

"His Lordship doth not think fit to make any order upon this motion, but doth order that the costs of the application be considered as costs in the cause."

Reg. Lib. 1827, A. 2892.

[*195] JOHN PARTRIDGE, Plaintiff; *and* JOHN USBORNE and CHARLES LANCELLOT HOGGART, Defendants.

1828; August 7, 8, 15. October 28, 31.

Matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a supplemental bill in the nature of a bill of review.

A party may obtain leave to file, and may file a supplemental bill in the nature of a bill of review, though he has not performed the decree in the original cause, if the proceedings under the decree are not at the time in such a state as to enable the adverse party to bring him into default for not having done what the decree orders.

A party will not be allowed, except under very special circumstances, to file a bill of review or a supplemental bill in the nature of a bill of review, or to prosecute it after he has obtained leave to file it, unless he performs at the proper time all that the decree commands him to do.

A purchaser, who was defendant in a suit for specific performance, did not in his answer mention any warranty given, or representation made by the vendor, and insisted merely that a good title was not shown; a reference on the question of title was ordered; the master reported in favor of the title, and a decree for specific performance was pronounced. After the order of reference had been made the defendant discovered that the timber on the estate, which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty having been given was strongly controverted: under these circumstances leave was given to file a supplemental bill in the nature of a bill of review, in order that the defendant might have the same benefit of the alleged warranty, as if he had originally insisted upon it in his answer.

After leave given, he has a right to file such a bill without having previously paid the purchase money which the decree commands him to pay, if the time, at which the adverse party, in the due execution of the decree, can compel payment, has not yet arrived.

Semble, As soon as that time arrives, he will not be allowed to proceed with his bill, until he pays the purchase money to the vendor; and such payment will not be dispensed with, nor will payment of the money into court be allowed to be substituted for it, though the sum be very large.

THE suit was by a vendor against a purchaser, for specific performance of a contract for the purchase of an estate: and, after a final decree had been made in it, a petition was presented by the defendant, praying that he might be at liberty to exhibit a bill of review, or a supplemental bill in the nature of a bill of review.

[*196] *The plaintiff had caused the fee simple of an estate, situate near Ross, in the county of Hereford, to be advertised for sale by public

[1] As to the writ of *ne exeat*, in general, see 3 Russ. 612, n. 2.

auction, at the auction mart in the city of London, on the 20th of October, 1825. In the particulars, which were circulated prior to the sale, the property was described "as a freehold estate, comprising Penyard Park Wood, containing 569 acres of land, planted with magnificent oak timber, stores, and coppice of great value: also the remains of the ancient castle of Penyard, and the lawn farm in the centre of the woods, containing upwards of 74 acres of excellent arable and pasture land, presenting a beautiful site for the erection of a mansion." In another part of the particulars was the following statement:—"The property comprises Penyard Park Wood, containing 569A. 0R. 17P. of land, be the same more or less, planted with magnificent oak timber, stores, coppice, of great value, and acknowledged to be one of the finest woods in England for the growth of timber: 50,000*l.* worth of the timber and coppice now standing, (a great part of the latter, thirty year's growth,) may be cut in the next three years, at the same time leaving an ample stock for future falls." One of the conditions of the sale was as follows:—"If through any mistake the estate should be improperly described, or any error or mis-statement be inserted in the particular, such error or mis-statement shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way."

On the 20th of October, 1825, the estate was put up for sale at the auction mart, by the defendant C. L. Hoggart. At that sale, the defendant Usborne became the purchaser of the property at the price of 72,900*l.*: and he immediately paid a deposit of 10 per cent., and signed, at [*197] the foot of one of the printed particulars a written memorandum of the contract.

In January, 1826, Messrs. Tovey and James, the vendor's solicitors, delivered an abstract of the title to the estate. Objections to the title were taken, and these not having been removed to the satisfaction of Usborne, he refused to complete the purchase. The consequence was, that, in Trinity term, 1826, Partridge filed his bill, praying that Usborne might be decreed to perform the contract, and might be restrained from bringing any action for the deposit against the auctioneer Hoggart. Usborne, by his answer, admitted the contract: and the only defence suggested by him was, "that he believed that various objections to the title of Partridge to the said hereditaments and premises, which were taken by the defendant's legal advisers, were valid objections to the said title;—that Partridge had not shown and evidenced a good and perfect title to the said hereditament and premises;—and that he was not able to make, or procure to be made, a conveyance thereof in fee simple to the defendant."

By an order of the Vice-Chancellor, bearing date the 6th of November, 1826, it was referred to the master to inquire, whether a good title could be made to the estate comprised in the agreement in the pleadings mentioned, according to the conditions of sale; and in case he should be of opinion that

a good title could be made, he was to inquire when it was first shown that such title could be made.

On the 1st of June, 1827, the master reported in favor of the
[*198] title, and found that it was first shown on *the 17th of February, 1827, that a good title could be made to the estate.

Both parties excepted to the report.

In Trinity term, 1827, before the exceptions had been disposed of, Usborne filed a bill against Partridge, alleging that certain representations with respect to the quantity of timber on the estate had been made by the vendor and his agents, on the faith of which the contract of purchase had been concluded, and that these had been since discovered to be inaccurate and false. The prayer was, that this new cause might come on to be heard with the cause in which Partridge was plaintiff; and in case the court should be of opinion that Partridge could make a good title to the property, and that he, Usborne, ought specifically to perform the agreement, then that an account might be taken of the quantity of timber standing and growing upon the hereditaments and premises at the time of the sale, and of the value thereof at that time, and that a proper abatement or allowance might be made out of the residue of the purchase money remaining unpaid, in respect of the deficiency in the quantity of the timber. Leave to file this bill had neither been asked nor obtained.

Partridge having demurred generally for want of equity, his demurrer, on the 22d of January, 1828, came on to be argued before the Vice-Chancellor.

In support of the demurrer, it was contended that the allegations of misrepresentation, contained in the bill, were vague, indistinct, and inconsistent,
and that it was impossible to collect with accuracy from the bill, what
[*199] the difference was between the actual quantity of timber *admitted to be on the estate, and the quantity which the vendor was said to have represented to be on it. It was further contended, that, even if a substantial case had been clearly alleged in the bill, the plaintiff was precluded from having any relief in respect of it. This bill was meant to operate as a defence against the suit for specific performance; but of the matters here suggested, not a word was to be found in the proceedings in that cause. Usborne was bound to have put the whole of his defence on the record in the original suit; and that suit could be disposed of only with reference to what appeared in the bill, the answer, and the master's report. If Usborne's exceptions on the point of title were overruled, a decree for specific performance, and for the payment of the residue of the purchase money, would be of course; but if this suit were to go on, there would hereafter be another decree in the same matter, which might be different from and inconsistent with the former.

The Vice-Chancellor allowed the demurrer.

On the same day the exceptions in *Partridge* v. *Usborne* were argued,

and the cause was heard on further directions. Usborne's exceptions were overruled; Partridge's were allowed: and by the decree on further directions, "it was declared that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, and the court did order and decree the same accordingly; and it was referred to the master to compute interest, after the rate of four per cent. per annum, on the sum of 65,610*l.*, residue of the purchase money, from the 25th day of March, 1826; and, upon the plaintiff and all proper parties, as the master should direct, executing to the defendant, or to such person or persons as he should appoint, a proper conveyance of the estate and premises, (such conveyance to be settled *by the master, and such execution thereof to be also certified [*200] by the said master,) it was ordered that the sum of 8459*l.* 13*s.* 11*d.*, bank three per cent. annuities, standing in the name of the accountant general, in trust in the cause, purchased with the amount of the deposit, and any interest which might accrue on the same annuities previously to the transfer thereof, should be transferred and paid to the plaintiff; and, upon the delivery by the plaintiff of the said conveyance so executed, and upon the delivery upon oath (if necessary) of all deeds and writings in his custody or power, relating to the said estate, to the defendant Usborne, or to whom he should appoint, it was ordered that the defendant Usborne should pay unto the plaintiff the said sum of 65,610*l.*, together with what the master should compute for interest thereon." Usborne was also ordered to pay the costs of the suit.

Usborne then presented his petition for leave to file a bill of review.

According to the allegations of the petition, Usborne, on the 28th of September, 1825, called upon Hoggart, and inquired of him whether the timber standing and growing on the Penyard property had been measured, and whether the vendor would warrant the quantity; adding, that as there was not time to have an admeasurement of the timber made before the day of sale, he could not form an estimate of the value of the estate, and would not bid for it, unless the quantity of timber standing and growing upon it were ascertained and warranted. Hoggart replied that the timber on the estate had been measured; that he was not then in possession of the particulars or result of such measurement, but he would write to his employers for them. Accordingly, on the same day he sent to Messrs. Tovey and James, the *agents and solicitors of Partridge, the following letter:— [*201]

"I have received several applications for the particulars of the Penyard estate; and persons, who will not trouble themselves to employ agents to look over the timber, are desirous of having some statement of the quantity of timber fit for felling, and the admeasurement as nearly as possible, so as to form a tolerably near idea of its value, together with the stores. If, therefore, you have such an estimate at hand, I will beg of you to send it to me. It will very materially benefit the sale of the property, and remove any doubts as to the quantity and value we have set forth, of which I have

no doubt myself, but you know the difficulty of convincing others. Your early reply will oblige," &c.

The answer of Tovey and James was as follows :—

"We send you particulars and valuation of the Penyard property. The valuation of the woodland property was made, we think, by as able a surveyor as can be found, and we have again seen him this morning, and he says that he has no doubt but the timber and coppice would sell immediately, and produce the prices put upon them, and that the whole is not overvalued. We have also sent you a copy with only the quantities, omitting the prices, as it may not be desirable to show our prices. Mr. Partridge and one of us propose being in London the Tuesday evening before the sale, so as to confer with you on Wednesday morning," &c. &c.

One of the papers enclosed in this letter purported to be an account of the timber, stores, underwood, and saplings upon the estate; and a copy
[*202] of it was annexed to the petition. In this estimate the woods were considered as divided into sixteen cuts or divisions. It stated the number of the timber trees, classed according to their dimensions, and also the number of stores in each of these sixteen cuts; the quantity of timber contained in such trees and stores, expressed in loads and feet, except that the stores in cuts 4, 5, and 6, were described as containing 2½ feet each; and the number of acres of underwood and saplings.

The other paper, inclosed in the letter, was a money valuation of the property, proceeding upon the quantities stated in the first mentioned document.

The petition further alleged, that, on the 6th of October, 1825, the petitioner again called upon Hoggart, and inquired of him whether he had received the admeasurement of the timber; that Hoggart then delivered to him the account of the quantity of timber, which had been sent by Messrs. Tovey and James, stating, as an inducement to the petitioner to rely on its accuracy, that his majesty's government, having contemplated the purchase of the property for the sake of the timber, had caused the timber to be measured and valued, and that their admeasurement agreed with that which was produced; that, in confirmation of this, Hoggart observed, that, according to the plaintiff's admeasurement, cut 2 contained 841 loads of timber, while, according to the government admeasurement, the same cut contained 831 loads, and, according to the admeasurement of a Mr. Saitridge, 840 loads; that Hoggart at the same time said that he had received the admeasurement from Messrs. Tovey and James, and was authorized by them, as agents of the plaintiff, to warrant the quantities of the timber and stores, underwood and saplings, to be correctly stated in it.

[*203] That the petitioner, by Hoggart's permission, took away with him the account of the timber, stores, underwood and saplings, and that having caused a copy of it to be made, he, in a day or two afterwards, returned it, from which time, until the sale, it lay in Hoggart's office for the

inspection of all persons who might make inquiries as to the quantity of timber on the estate.

That the petitioner delivered to his surveyors, Mr. C. P. Charlton and William Williams, copies of the account so furnished by Hoggart, and instructed them severally to view and value the estate and the timber trees, stores, underwood, and saplings growing on it, assuming as the basis of such valuation that the quantity of timber, stores, underwood and saplings upon the estate was correctly represented in that account; and that he informed them that Hoggart had stated that the vendor would guarrantee the quantities of the timber and stores, underwood and saplings to be correctly stated in such account; and, therefore, in making their valuations they would have to consider only the quality and value of the timber.

That, on the 16th of October, the petitioner and Williams went to Ross, where they met Charlton; that Charlton and Williams proceeded to view the estate and make their valuation of the property, upon the basis and assumption that the statement of the quantities of timber, &c. contained in the account furnished by Hoggart, was correct; that Charlton advised the petitioner to bid as high as 73,000*l.*; and that Williams' valuation amounted to 74,647*l.* 12*s.*; but that he advised him not to bid more than 72,000*l.*

That on the morning of the 20th of October, 1825, the day appointed for sale, Charlton, by the direction of the petitioner, called upon Hoggart and informed him that the, Charlton, had been to look at the estate [*204] on behalf of the petitioner, and was about to advise him to bid for it up to a certain sum, provided the quantities of timber, stores, underwood, and saplings stated in the account were warranted to be correct; that Hoggart replied that the account might be relied upon, and that he was authorized by the vendor to guarantee and would, on the part of the vendor, guarantee the same; and that, in corroboration of the accuracy of the account, he added, that the wood on the estate had been measured by the agents of government, and, upon comparison, little variation had been found between their admeasurement and the quantities stated in the account which had been furnished to the petitioner.

That Charlton before the sale, communicated to the petitioner what had thus passed between him and Hoggart; and that the petitioner, together with Charlton and Williams, attended at the sale.

That Hoggart, before the property was actually put up to sale, stated to the persons assembled, that the wood on the estate had been measured and valued; that he was authorized by the proprietor to warrant such admeasurement as being correct, and its accuracy had been confirmed by persons sent by his majesty's government; that he then enumerated the quantities of the timber trees, stores, underwood, and saplings stated in the account furnished to him by Messrs. Tovey and James, and set forth the particulars of a valuation of the property, made on behalf of the owner, which amounted in the whole to 87,388*l.*, including upwards of 74,000*l.* for timber and underwood;

and that he declared that the estate was offered for sale with and under an express warranty on the part of the owner as to the quantity of the timber trees, stores, underwood, and saplings.

[*205] *That, from the shortness of the interval between the time when the attention of the petitioner was first drawn to the property and the day of sale, it was wholly impracticable to ascertain the quantity of timber by actual measurement, and that he was compelled to rely, and, at the time of bidding for and becoming the purchaser of the said hereditaments and premises, did rely upon the statements contained in the account furnished and upon the warranty given by Hoggart.

The petition, after stating the agreement of purchase, together with the substance of the vendor's bill for specific performance, and of the answer, alleged that the petitioner, at the time of filing his answer, and from that time until he received from Mr. W. Lonergan such information as was thereinafter mentioned, fully relied upon the statements contained in the account furnished by Hoggart; and, in reliance upon these statements, did not suppose or believe that any of the matters relating to the quantity of the timber and stores on the property, and the warranty thereof, were material to be mentioned in his answer, and he wholly omitted to state any of them to his solicitor before or at the time of filing his answer; but the petitioner did not by his answer intend to waive, or believe that by such answer he had waived, the benefit of the warranty.

That a few days previous to the 1st of May, 1827, Mr. W. Lonergan, in a conversation on the subject, recommended to the petitioner to be attentive to the quantity of the timber and stores; for he had been told by a Mr. Richards, who had looked at the estate with a view to purchase it, that there had been great errors in making up the account of the timber trees and stores for the purpose of the sale.

[*206] *That this information, for the first time, led the petitioner to suspect, that the account, furnished to him by Hoggart, was not a correct account of the quantity of the timber in the trees and stores upon the estate; and, on the 1st of May, 1827, he communicated to his solicitor the information he had thus received, and then, for the first time, made them acquainted with the representations and warranty given by Hoggart as to the quantity of the timber trees, stores, underwood, and saplings: that, upon inquiry, it was found that the measurement or supposed measurement stated in the account had been made by a Mr. Lees, who had died in April, 1827: that cuts No. 1 and No. 16 were then measured, when there was found to be a deficiency of 167 loads; that the surveyors were of opinion that the quantities in the other cuts were equally deficient; that Usborne also learned that the government measurement, though he was not then able to obtain a copy of it, had made the quantity much less than that which was stated in the account delivered by Hoggart; that he proposed to Partridge to have the amount of compensation, which should be allowed him for the deficiency,

settled by arbitration, but his proposal was rejected; and, under these circumstances, he filed the bill of which mention has been already made: that, the demurrer to that bill having been allowed, Usborne caused a new measurement of the timber to be made by two experienced surveyors, Messrs. Attfield and Trumper; and notice was given to the vendor, that a surveyor might attend on his part to check their proceedings; but he declined to interfere in any way: that the result of this measurement was as follows:—The whole quantity of timber, contained in the timber trees in the sixteen cuts, was 3722 loads and 28 feet, and the whole quantity of timber, contained in the stores, was 2613 loads and 26 feet, and no more; whereas, according to the account furnished by Hoggart, the whole quantity of timber contained in the timber trees in the sixteen cuts, amounted to 3779 loads and 31 feet, and the whole quantity of timber, contained in the stores, to 3539 loads and 30 feet; so that the actual quantity of timber in the timber trees and stores was less than the quantity stated in Hoggart's account by 983 loads and 7 feet, notwithstanding that the wood had had the advantage of two years' growth, since the time when that account was furnished to the petitioner. The petition further stated, that, if timber and coppice wood standing upon the estate to the amount of 56,000*l.* should be cut down, there would not be sufficient stock left for future falls. [*207]

The petitioner, it was further stated, had made repeated efforts to obtain an inspection of the admeasurement and valuation by the government surveyors, but he had been unable to get a sight of it until the 29th of April, 1828. By that measurement and valuation, which appeared to have been received, on the 13th day of October, 1824, from the persons who made it, the whole of the timber trees, stores, underwood, and saplings in the sixteen cuts of woodlands were valued at the sum of 47,751*l.* 17*s.* 5½*d.* and no more.

The discrepancy between this measurement and that made by Lees, had, it was alleged, been the subject of discussion between the agents of the government and Mr. Partridge and his agent. In the course of the discussion, Mr. Turner, the government surveyor, had objected, that Lees had greatly exaggerated the quantity of timber by adopting a mode of measurement which was unfair and contrary to the ordinary practice, inasmuch as he had made only half the usual allowance for bark, and had measured the trees up to three inches quarter girth instead of only to six inches quarter girth; and that, even according to this improper mode of measurement, the quantity had been greatly over stated. Lees, however, refused to accede to any other principle of measurement; and it was at last agreed, that Lees should, in Turner's presence, re-measure cut No. 2 in his own way. The result was, that, though Lees had stated the timber in this cut to amount to 1022 loads, it was found to be only 841 loads, including eleven loads which had not before been considered as part of it. This reduced number of 841 loads was the quantity of timber in cut No. 2, stated in Hoggart's account; but no correction was made in Lees' statement of the ad- [*208]

measurement of the other fifteen cuts: and, in the statement furnished to the purchaser the quantity of timber in each of them was allowed to remain as Lee had originally represented it.

The prayer of the petition was, that the petitioner might be at liberty to exhibit a bill of review or a supplemental bill in the nature of a bill of review (as the case might require) in the cause of *Partridge* v. *Usborne*, to the intent that he might have, in that suit, the same benefit of the warranty respecting the quantity of the timber upon the estate, as he would have had, in case it had been set forth by way of defence in his answer to the original bill.

The communications between Hoggart, Usborne, and Charlton, and Hoggart's representations and statements, were verified not only by Usborne and Charlton, but by Hoggart, who made an affidavit in support of the petition. In this affidavit, after stating what passed between him and Usborne and between him and Charlton on the different occasions referred to in the petition, he said that, on the morning of the 20th of October, when the sale was about to commence, the plaintiff, Partridge, "expressly authorized and directed him to warrant that [*209] *the quantity of timber standing on the estate, according to the before mentioned admeasurement and valuation furnished to him, Hoggart, was correct and might be relied upon: that, accordingly, he, Hoggart, after reading the particulars and conditions of sale, stated, that the woods on the estate, which formed the most material part of its value, had been measured and valued; that he was authorized by the proprietor to warrant such admeasurement as correct, and that the accuracy of such admeasurement had been confirmed by persons sent by his majesty's government to measure the timber; that he, Hoggart, then stated the number of loads of timber and the number of stores, and the contents thereof in the several cuts, cut by cut, as the same appeared on the said admeasurement; that he also stated the estimated value of such timber from the valuation which had been sent to him along with the account of quantities; and that he declared that the estate was offered for sale with and under an express warranty on the part of the proprietor, that the quantity of timber trees, stores, underwood, and saplings thereon was to the amount represented by the said admeasurement."

The results of the actual admeasurements of the timber and stores in the sixteen cuts of the woodlands were verified by the surveyors who had made the admeasurements.

Turner, who had surveyed the woods in 1824, on behalf of his majesty's government, proved that he had then valued them at 47,751*l.* 17*s.* 5½*d.*; that, in October, 1824, a meeting took place between him, Turner, and the plaintiff and his solicitor Tovey, in the presence of one of the commissioners of woods and forests, and the secretary of that board, for the purpose of endeavouring to explain and account for the difference [*210] *between the admeasurement made by him, Turner, and the admeasurement fur-

nished by the plaintiff; that it was then stated by Tovey that the latter admeasurement was an estimate, which had been made by a Mr. Lees from view only; that it was agreed that Turner and Lees should together admeasure cut No. 2., and they accordingly met for that purpose; that the mode of admeasurement proposed to be pursued by Lees was contrary to the usual mode of measuring timber, and calculated to make the quantity appear much greater than it really was; that he, Turner, objected thereto, and required that the usual mode of measurement should be pursued; but Lees stated that Mr. Tovey insisted upon the adoption of the mode proposed by him; that he, Turner, thereupon consented to that mode, observing that a reduced price must, in consequence, be put upon the timber; and that, accordingly, the timber in cut No. 2. was measured in the way insisted upon by Lees; that, in the account furnished by the plaintiff to the commissioners, the quantity of timber contained in the timber trees and stores in cut 2, was made to amount to 1022 loads; but, upon the admeasurement made by Lees and him, Turner, jointly, the quantity of timber in these trees and stores was ascertained, even according to the mode of measurement followed by Lees, to be 841 loads and no more; from which 10 loads were to be deducted, as belonging to cut No. 1.; that, in May, 1825, a meeting took place in London between Tovey, Lees, and Turner, before the commissioners of woods and forests, when the difference as to cut 2, between the original account furnished by the plaintiff and the result of the last admeasurement was the subject of discussion; that, to the best of his recollection and belief, the plaintiff was present at the meeting; that he, Turner, stated to the commissioners his opinion that the difference in quantity between the plaintiff's original account and the actual *admeasurement, which had been ascertained [*211] to exist as to cut No. 2., should be taken to extend in proportion over the whole wood, whereby a deduction of one-third, or thereabouts, from the whole quantity of timber stated by the plaintiff would be effected; and that, in his judgment and belief, a deduction to that amount from the quantity of timber, represented by the plaintiff to be on the estate, was necessary, in order to arrive at a fair and proper estimate of the value.

The surveyors and Turner also deposed, that, from the manner in which the number and quantity of stores within the sixteen cuts were stated in Lees' admeasurement, it appeared that, so far as regarded the stores at least, the number and quantity were obtained by him upon view, and not from any actual enumeration or admeasurement; and that, in such a mode of making an estimate, he would necessarily be liable to great error.

On the other hand the plaintiff swore, that he never in any manner authorized or directed Hoggart to warrant that the quantity of timber standing on the estate, according to the admeasurement and valuation furnished to him, was correct, and might be relied on, or to any such effect; that on the morning of the sale, no conversation whatever passed between him and Hoggar

on the subject of such a warranty; and that he had no conversation with Hoggart on the morning of the day of sale, except in the presence of Tovey.

Tovey confirmed this statement; and Tovey further swore that he had had great experience in the sale of timber, and of estates with timber upon them, and that, knowing how much, according to different modes of admeasurement, the quantity of timber on an estate might appear to vary, [*212] he had never, in any such sales, stated or *warranted the admeasurement of timber or stores; that, in settling the particulars of sale, if Hoggart had introduced any statement of measure or quantity, he should most decidedly have objected to it, the more especially from his being well satisfied that a contested admeasurement of so great a quantity of timber and stores as were upon the estate in question might take up eight or nine months: that, when he received Hoggart's letter of the 28th of September,(a) he considered the expression "the quantity and value we have set forth" to refer only to the amount, in value, of timber and coppice which might be cut in three years next after the sale, and not to any admeasurement of timber, there having been in fact no such admeasurement set forth in the particulars: that he did not send the valuation and admeasurement with any authority to Hoggart to warrant their accuracy, or with any expectation that Hoggart would do so, but under an expectation only that any persons, to whom Hoggart might show the admeasurement, would consider it as an admeasurement procured by Partridge, upon which they would place what reliance they thought fit: that he, Tovey, never saw Hoggart upon the business of the sale, until the 19th or 20th of October, 1825, and, as he believed, not till the morning of the 20th; that he never, at any time previous to the 20th of October, made any communication to Hoggart concerning any admeasurement of the timber by the agents of his majesty's government; and that he did not, on the said 20th of October, inform Hoggart that the admeasurement of the government agents, as to the whole or any part of the wood, agreed with the plaintiff's, or nearly so, except that, on the morning of the sale, the deponent informed Hoggart that cut No. 2. had been, by consent of the plaintiff and of [*213] the commissioners of woods and *forests, measured by both their surveyors, and that their admeasurements of that cut did agree, or nearly so.

The plaintiff and Tovey both swore, that, at the sale, Hoggart did not give any warranty, and that he expressly stated that he would not warrant the accuracy of the admeasurement. Five other persons, who were present at the sale, concurred in stating that no warranty was given by Hoggart; and two of them swore, that he expressly declared that the quantity of timber was not warranted.

Tovey further stated, that Lees' valuation and measurement were made originally in 1820, with a view to a partition of the family estates, to which

(a) See supra, p. 201.

the plaintiff and his sisters were entitled in equal shares: that, in 1824, while the negotiation with the commissioners of woods and forests was going on, Tovey desired Lees to make a new valuation of the timber, and an estimate of its quantity; that Lees informed Tovey that, having made an admeasurement of the wood so recently as 1820, it was not necessary to make a new admeasurement of the whole wood; that it would be sufficient to view the wood, and measure parts of it, to justify a certain addition for growth to the former admeasurement; that the mode, by which Lees obtained his quantities in the valuation made in 1824, was by taken the admeasurement in his valuation of 1820 as the basis of it, and making an average addition upon the whole wood, according to such increase of wood as his experience had shown him usually took place in property of that description; that Lees, on that occasion, stated, that, though some of the older and thick divisions might have increased but little for many years, yet the others would make up for their deficiency; that Turner, in his original admeasurement, made cut No. 2 contain 242 loads 42 feet and a half *less than the result of the [*214] admeasurement made jointly with Lees; that Tovey called the attention of Lees to the circumstance, that he, Lees, in his valuation made in 1824, had stated the timber trees and stores in cut No. 2 to contain 1022 loads, whereas, on the joint admeasurement of Turner and himself, he had made the same amount to only 840 loads and 44 feet; that Lees, in explanation observed, that there were some of the large divisions of the wood, which, from having had a most unusual number of timber trees, saplings, and stores left to stand at the last fall, had become so dense and clustered, that they had made little or no improvement for several years past; that Turner expressed the same opinion to the deponent, and both Turner and Lees stated that cut No. 2 was one of that description, and had improved but little, if at all, for many years past, from being so crowded with timber, stores, and wood, that the sun and air could not have free circulation in it; that the deponent inquired of Lees whether the other cuts or divisions would come up to their measurements as stated by him, when Lees answered, that he had no doubt they would do so, and would also make up for the deficiency in cut No. 2; that the treaty with the commissioners of woods and forests continued till July, 1825, when it was broken off in consequence of their offering only 66,674*l.* for the estate, while Partridge refused to take less than 75,000*l.*; and that the property was fully worth the price at which the petitioner had bought it.

Mr. *Bickersteth*, Mr. *Knight*, and Mr. *Wigram*, for the petitioner:—A party, who applies for leave to file a bill of review, must make out two things to the satisfaction of the court; first, that the new matter, to which the application relates, is relevant and material; and, secondly, *that [*215] such new matter was not discovered in time to admit of his having the benefit of it in the regular course of the proceedings in the cause,

and that laches is not imputable to him, because it was not discovered in time.

I. The new matter, in this case, is relevant and material. "If the court is satisfied," says Lord Redesdale,(*a*) "that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed." Here it is not merely probable, but certain, that a different decree would have been made, if the newly discovered matter had been stated as a defence in the answer. A defendant, in a suit for specific performance, may insist upon matter, though not in writing, which shows that it would be unjust to carry the written agreement into effect. So strictly does a court of equity adhere to the rule of refusing to interfere where fraud or misconduct can be imputed to the party calling for its assistance, that a mere ambiguity in the wording of a contract has been considered a sufficient ground for not decreeing specific performance, even where no extrinsic fraud was alleged. *Harnet* v. *Yielding*,(*b*) *Higginson* v. *Clowes*.(*c*) Any thing amounting to incorrectness of conduct on the part of the plaintiff,(*d*) and, *a fortiori*, fraud or misrepresentation, constitute a personal bar to him in a suit for specific performance.(*e*)

[*216] The misrepresentations, in this case, whether intentional or not, are clearly made out. The transactions and communications prior to the sale can scarcely be considered as in dispute; for though the respondent and his solicitors, in direct contradiction to what Hoggart has expressly sworn, say, that they never authorized Hoggart to warrant the quantity of timber, it is not necessary to weigh the oral evidence on that point. The denial of Hoggart's authority to warrant the timber is, for every legal purpose, disproved by the correspondence between Hoggart and Messrs. Tovey and James. Hoggart, in his letter of the 28th of September, asks for a statement of the quantity of timber on the property, in order to remove all doubts, on that head, from the minds of persons making inquiries with a view to the intended sale. Tovey and James, in their answer, send Hoggart two papers,—one, containing a statement of the quantity of timber—the other, a money valuation of the estate; and they direct him not to show the latter document. The direction not to show the latter is conclusive to prove that the former paper, in compliance with Hoggart's request, was sent for the purpose of being shown to intending purchasers. When, therefore, Hoggart delivered that paper to the petitioner, and made the representations respecting it, which we now complain of, he was acting within the letter of an express authority. In law, as in common sense, such a representation, under such

(*a*) Treatise on Pleading, 4th edit. p. 84, 85.
(*b*) 2 Sch. & Lef. 554, 558.
(*c*) 15 Ves. 516. 1 Ves. & B. 524.
(*d*) *Cadman* v. *Horner*, 18 Ves. 11. *Scott* v. *Hanson*, 1 Sim. 14. [15, n. 1.].
(*e*) *Claremont* v. *Tasburgh*, 1 Jac. & W. 120. 18 Ves. 11.

circumstances, is equivalent to a warranty. *Lysney* v. *Selby*,(a) *Pasley* v. *F*[illegible],(b) [illegible]*bell* v. *Stevens*.(c)

The implied authority of the auctioneer, independently of extrinsic matter, would, of itself, be sufficient to render the warranty binding; and the want of an express authority in the auctioneer to give the warranty *would not invalidate the defence on which we rely. In *Winch* [*217] v. *Winchester*,(d) the auctioneer had no authority to give the warranty upon which the defence in that case was founded.

The truth of the allegation, that Hoggart, at the sale, warranted the timber, is controverted. Hoggart, however, who must best know what he said and did, confirms the statement of the petitioner; and two most respectable witnesses, who attended the sale, depose to the same effect. It is admitted, on all hands, that he read the statement, and specified from it the quantities of timber on each of the sixteen cuts. Is it likely that, after the correspondence which had taken place between him and Messrs. Tovey and James, and the representations which he had made to the petitioner, he should have done all this merely for the purpose of adding, that bidders were not to rely on the accuracy of the quantities as specified in that document.

Even if the warranty at the sale be not satisfactorily made out in evidence, there remains, at least, the admission that Hoggart at the sale declared, that Lees' measurement agreed with that of government, and that its accuracy might be relied upon. Now, Lees' measurement did not agree with that of government; for, even as to cut No. 2, the joint measurement of Turner and Lees was objected to by Turner as the result of an unusual and unfair mode of measuring; and so far was Lees' measurement from being one which could be relied upon, that, in the only instance in which its accuracy had been tried, namely, in the measurement of cut No. 2, it was found to exceed the true quantity of timber in the proportion of 1022 to 847; and it was accordingly corrected as to that particular cut. The paper delivered *by Hoggart to the petitioner, and read at the sale, was, as to quanti- [*218] ty of timber, the result of Lees' measurement, corrected as to cut No. 2 only, and left uncorrected as to the other fifteen cuts. The respondent was present at the sale, and heard the representations which Hoggart made. He knew them to be unfounded, for he was present both at the meeting with the agents of government, which led to the partial correction of Lees' measurement, and at the subsequent meeting, also, at which the correction of cut No. 2 was actually made; and yet he suffered Hoggart's misrepresentations to go forth uncontradicted. The respondent is clearly implicated in the misconduct of his agent. In *Edwards* v. *M'Leay*,(e) Sir W. Grant set aside a sale of lands, the conveyance of which had been executed, because the vendor had improperly concealed a fact relating to the title of part of the lands, which, if communicated to a purchaser, was calculated to depress the price

(a) 2 Ld. Raym. 1118. (b) 3 T. R. 57. (c) 3 B. & C. 623. (d) 1 Ves. & B. 375. (e) Cowp. 308.

of the estate. In *Beaumont* v. *Dukes*,(*a*) Sir T. Plumer refused to enforce a contract for the purchase of lands, because the seller had improperly made representations which were calculated to enhance the price of the estate. *Buxton* v. *Lister*(*b*) is to the same effect. The principle of these cases is applicable here That the timber had been measured by a person of reputed skill, was a circumstance calculated to enhance the price of the property; that the measurement so made had been proved to be grossly inaccurate as to one cut, was a circumstance calculated to destroy its weight as to the remaining fifteen cuts. If the respondent thought proper to put forth Lees' measurement at all, he was bound, both in law and in common fairness, to have disclosed the qualifying circumstances, by which its weight, as a criterion of value, was wholly destroyed.

[*219] *Again, the paper delivered by Hoggart to the petitioner was represented to be the result of an actual measurement of the timber; whereas it is clear that it was a mere estimate of quantity, which had been proved, as to one cut at least, to be as inaccurate, in fact, as the mode in which it was made was loose and unsatisfactory. This alone is sufficient for the purposes of a defence. (10 Ves. 305.)

That part of the petitioner's case, the truth of which cannot be controverted, would sustain an action for deceit at common law,(*c*)—the severest test by which the substantial merits of his claim can be tried. This court, however, having given the respondent the benefit of equitable relief on the contract, will not send the petitioner to law, where his remedy would be more difficult and less complete, and where the justice of the case might be prejudiced by the proceedings which have taken place here.

It is in vain to say that the respondent really placed confidence in Lees' measurement, and that the case ought not now to be opened for the purpose of charging him with an unintentional misrepresentation. A party is not justified in making statements of the truth of which he is not certain. In *Schneider* v. *Heath*,(*d*) Mansfield, C. J. says, "It signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false." Moreover, con-

[*220] fidence in Lees' measurement, after the correction of *cut No. 2, was impossible. Such confidence would have been irrational credulity.

II. The second point involves two questions:—first, whether the new matter was, in fact, discovered in time to admit of its being introduced in the regular course of the proceedings in the cause? And, secondly, whether laches is imputable to the petitioner, because it was not discovered in time to

(*a*) 1 Jac. 422. (*b*) 3 Atk. 383.
(*c*) *Lysney* v. *Selby*, 2 Ld. Raymond, 1118. *Dobell* v. *Stevens*, 3 B. & C. 623.
(*d*) 3 Camp. 506.

admit of its being introduced in the regular course of the proceedings in the cause?

The earliest moment, at which the petitioner had any reason to suspect the truth of the representations made to him respecting the quantity of timber on the estate, was in May, 1827. The latest moment at which he could have introduced the new matter in the original cause, is determined by the order of the 6th of November, 1826. Is there, then, any ground on which laches, or a want of due diligence, can be imputed to him?

As to the second point:—The law, in the first instance, casts upon a purchaser the obligation to inform himself of all material facts relating to the subject matter of the contract; but if a vendor, at the time of a contract, will take upon himself to make representations as to material facts, and thereby lull the caution of the purchaser asleep, the purchaser, as between himself and the vendor, is justified in relying upon them. In *Lysney* v. *Selby*,(a) the seller of an estate represented to the purchaser that the rents were of a given amount. The estate was conveyed to the purchaser, who, after the *conveyance, discovered that the rents were of less annual [*221] amount than the seller had represented them to be. From the report of that case, it would appear that the purchaser did not wholly rely upon the representations of the seller, but made inquiries elsewhere. The court, however, was clearly of opinion, that the purchaser was not bound to inquire as to the truth of the representations made by the seller, and that he might recover compensation in damages for the deceit. In *Dobell* v. *Stevens*,(b) the seller of a public house represented to the purchaser that a certain average quantity of spirits was sold in the house per month. The house was assigned to the purchaser, who afterwards discovered that the representations of the seller, as to the quantity of spirits sold in the house, were false. On the cross examination of the plaintiff's witnesses, it appeared, that the treaty for the sale of the house took place on the premises; that the misrepresentations complained of were made there; that the account books of the seller were in the house at the time, and might have been inspected by the purchaser; and that the truth of the case would have appeared by the inspection of the books. The court, however, was clearly of opinion, that the plaintiff was entitled to recover damages. In *Buxton* v. *Lister*,(c) the seller of some timber represented to the purchaser that the timber had been measured and valued by two persons of judgment, whom he, at the time, named to the purchaser. The purchaser made no inquiries, but contracted for the purchase of the timber in reliance upon the vendor's representations; and Lord Hardwicke held, that the conduct of the seller was a bar to any claim on his part for a specific performance of the contract. In fact, to

(a) 2 Ld. Raym. 1118. (b) 3 B. & C. 623. (c) 3 Atk. 383.

say that a purchaser may rely upon the representations of a sel-
[*222] ler, and to hold at the same *time that he is guilty of laches in so doing, would be a contradiction in terms. It would, indeed, be monstrous, if a party, who had misled another by misrepresentations, could afterwards be heard in a court of justice to allege, that the very party, whom he had so misled, was guilty of laches, because he had given credit to those misrepresentations.

The omission of Usborne to state in his answer the circumstances now brought forward by the petition, proves the confidence which he places in the representations of the respondent. Laches, in such a case, will run only from the time when the deceit was discovered; and since the first of May, 1827, there has, in this case, been a diligent prosecution of the question by the petitioner.

III. There is a third point which requires to be noticed. It will probably be contended, on the other side, that a bill of review, in respect of matter newly discovered, can be maintained only where such new matter can be used as evidence to prove something which was in issue in the original cause; that a bill of review, or supplemental bill in the nature of a bill of review cannot be filed for the purpose of tendering a totally new issue; and that, in the present case, the alleged new matter is not evidence of any allegation made, or issue raised, by the defendants answer in the original suit, but tenders a new issue altogether unconnected with any issue raised by the pleadings. The point is adverted to by Lord Redesdale as one on which a doubt had been entertained, and he refers to a case of *Patterson* v. *Slaughter* in Ambler;(*a*) but he alludes to the doubt only for the purpose of re-
[*223] cording his deliberate opinion that it was not *well founded.(*b*) "In the case," says he, "where the doubt before mentioned appears to have been stated, the new matter discovered, and alleged as a ground for a bill of review, was a purchase for a valuable consideration, without notice of the plaintiff's title. This could only be used as a defence; and it seems to have been thought, that, although it might have been proper, under the circumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer and put it in issue, yet it could not be made the subject of a bill of review, because it created no title paramount to the title of the plaintiff, but merely a ground to induce a court of equity not to interfere."(*c*)

In *Young* v. *Keighly*.(*d*) Lord Eldon says, "As far as I can ascertain what the court permits with regard to bills of review upon facts newly discovered, the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case, and are not applicable where the original cause does not admit the introduction of the evidence,

(*a*) Amb. 293. (*b*) Treatise on Plead, 86, 87, 4th edit. (*c*) Treatise on Plead, 87.
(*d*) 16 Ves. 354.

as not being put in issue originally." There are no other authorities which countenance the doubt under consideration.(*a*)

The propriety of the decision in Ambler may be admitted without prejudice to the general question. The *new matter, in that case, [*224] did not bear upon the merits of the cause in which the decree sought to be reviewed was made. It did not, as in the case now before the court, show that the decree complained of was in itself unjust. The effect of the new matter in that case, if admitted, would have been—not to review a decree, which, upon the merits, was erroneous, but to shut out the merits of the case altogether, and to let in a new defence of a nature purely technical. It was not likely that a court of equity should, under such circumstances, listen to an application, which, it is admitted, is always addressed to the discretion of the court. Moreover, the grounds, upon which a purchase for value is recognized as a defence in equity,(*b*) might, after decree, apply with as much force to the party in whose favor the decree had been made, as to the party who sought to reverse it.

The passage from Vesey does not even in terms convey any expression of Lord Eldon's opinion on the point; and *Young* v. *Keighly* was decided upon another ground. It is highly probable that Lord Redesdale (who scarcely ever refers to modern authorities) had *Young* v. *Keighly* in his mind, when he wrote the passage which has been referred to. In the second edition of his work, the passage is not found. The case of *Young* v. *Keighly* came before Lord Eldon in 1809; and in the third edition of Lord Redesdale's book, which was published in 1814, he, for the first time, states the point, and records his opinion against its soundness.

Authority, therefore, upon the whole, is in favor of the petition. Then, is there any thing in principle to oppose it? Suppose a secret trust under a will, and a decree made for carrying the trusts of the will *into [*225] execution: is a party to have no relief, when he discovers the trust, because he was ignorant of it when the cause was heard? The contrary has been decided. *Barnes* v. *Offer*.(*c*) The case of *Roberts* v.

(*a*) In *Blake* v. *Foster*, (2 Ball & Beattie, 462,) Lord Manners says, "In the answer, the defendant has relied on her being a purchaser for valuable consideration, and on length of time as her defence. Now, the object of the supplemental bill is to abandon the original defence, and to rely on the plaintiff being barred by a deed of compromise. According to the opinion of Lord Eldon in the case I referred to, (*Young* v. *Keighly*) this cannot be done."

(*b*) Mitf. 109.

(*c*) BARNES v. OFFER.

1825; December 20.

R. BARNES, by his will, bearing date the 18th of February, 1822, devised unto George Offer, his heirs and assigns, certain freehold messuages and hereditaments; and he devised the residue of his real estate to his brother John Barnes. Robert Barnes died on the 2d of May, leaving John Barnes his heir at law.

In November, 1822, John Barnes filed a bill against Offer and other defendants, one of the objects of which was to have the will of R. Barnes established, and the trusts of it carried into execution:

[*226] *Kingsley(a) supports the same rational view of the subject. The difficulty of admitting new matter, not in issue in the cause, is supposed to consist in this,—that matter not in issue in the cause cannot be noticed by the court. Now, this is not universally true. The court, indeed, cannot make a decree upon matter not in issue in a cause; but if matter which would constitute a defence, be disclosed by the evidence in a cause, though not put in issue by the pleadings, the court will so far notice it, as to direct inquiries; and if the result of these inquiries be to show a case that would make a specific performance improper, means will be found to do justice between the parties. *Parken* v. *Whitby*.(b) The supposed difficulty, however, does not, in truth, apply to the case of a bill, of review; for the office of the bill of review is to put the new matter in issue. The original decree will be reviewed at the same time that the bill of review is heard; and then, as in the common case of cause and cross cause coming on to be heard together, the court will make one decree in both causes, without examining whether the pleadings in each cause, separately considered, would support the decree which is made in both.

[*227] *The allowance, by the Vice-Chancellor, of the demurrer to the bill filed by the petitioner, does not affect the present question. Whether that bill was or was not defective, in not stating the case with sufficient precision, is now a matter of indifference. The demurrer was allowed on a conception as to the pleadings and the documents referred to in them, which has since been ascertained to be erroneous in fact; but the bill, being filed without leave first obtained, was unquestionably irregular in form; and an appeal would therefore have been useless. The case is now stated in all its

and, on the 2d of August, 1824, a decree was made in that suit, which ordered, among other things that the will of Robert Barnes should be established, and the trusts of it performed, and that all necessary parties should concur in conveying to Offer the estates devised to him.

In December 1825, John Barnes, the plaintiff, presented a petition, which, after setting forth the proceedings in the cause, stated, that the conveyance to Offer had not as yet been executed; and that the petitioner, since the date of the decree, had discovered that the devise to Offer was made to him upon some secret trust for charitable purposes, which the testator in his lifetime communicated to Offer; that there was some understanding or agreement between the testator and Offer, that the estate devised to Offer should by him be applied to such charitable purposes; and that the first information, which he, the plaintiff, received of such secret trust, agreement, or understanding was from Matthew Crawford, an intimate friend of the testator, who, on or about the 25th of October, 1825, in a conversation with his, John Barnes' solicitor, stated that Offer was appropriating to his own use the estates which Robert Barnes had devised to him upon a secret agreement between the testator and him, that the same should be applied to certain charitable purposes, the particulars of which Crawford did not disclose. Under these circumstances the petitioner insisted that the devise to Offer was void, and prayed leave to file a supplemental bill in the nature of a bill of review, for the purpose of bringing before the court the fact of this secret trust.

On the 20th of December, 1825, an order was made by the Master of the Rolls, that the petitioner should be at liberty to file a supplemental bill in the nature of a bill of review, for the purposes in the petition mentioned.[1]

(a) 1 Ves. sen. 238. (b) 1 Turn. & Russ. 366, and see *Miller* v. *Jackson*, 1 Young & J. 65.

[1] Vide *Hone* v. *Van Schaick*, 7 Paige, 230.

minuteness of detail, and is brought forward in due form. What the petitioner now asks is—not relief upon the merits—but only an opportunity to try the case in a judicial manner.

Mr. *Sugden*, Mr. *Preston*, and Mr. *Koe*, for the respondent:—A supplemental bill in the nature of a bill of review must pray for some relief which might be had on an original bill. The object, which this petitioner seeks to accomplish, is, to have a written contract performed with a parol variation. That is a jurisdiction which does not belong to the court.(*a*) It could not grant such relief on an original bill, and will not give leave to file a supplemental bill for a like purpose.

No instance can be adduced, in which the discovery of new matter, not in issue in the original cause, has been sustained as the ground of a bill of review. In all the precedents of bills of review, which can be found, the new matter has invariably been matter to be used as evidence in support of what was previously in issue. *The precedents of the court are [*228] the best interpreters of the law of the court; and the conclusion to which those precedents lead is supported by express authority. In *Patterson* v. *Slaughter*,(*b*) Lord Hardwicke says, "All the bills of review I recollect to have known, were of new matter, to prove what was put in issue. Lord Effingham's case was so: he claimed under an old entail; and though he afterwards made title under a different entail, yet the issue was as claiming under some old entail generally. In the present case, it is not new matter to prove what was put in issue, but to prove a title that was not in issue; and, therefore, the defendant would not be entitled to a bill of review. The authority of Lord Eldon, in *Young* v. *Keighly*,(*c*) is equally express to the same effect; and his observations there carry the more weight, that he seems to have felt that he was deciding against the probable substantial justice of the case. Here, the only issue tendered by the answer in the original cause, was, that the plaintiff could not show a good title. The matter now brought forward has no connection with the point of title, and seeks to raise a question altogether new. The petition, therefore, seeks a relief which Lord Hardwicke and Lord Eldon have both declared not to be according to the course of the court, and which is not warranted by a single precedent.

"Upon a supplemental bill, in the nature of a bill of review," says Lord Eldon,(*d*) "the question always is, not what the plaintiff knew, but what, using reasonable diligence, he might have known." When Partridge filed his bill for specific performance, it was the duty of Usborne to state all the grounds of his resistance. He was well aware of the alleged warranty as to the quantity *of timber, and he had had ample time to as- [*229] certain whether this supposed warranty was according to the fact. If he had slumbered previously, the filing of the bill ought to have warned

(*a*) But see *Robinson* v. *Page*, 3 Russ. 114.
(*b*) Amb. 293.
(*c*) 16 Ves. 348.
(*d*) *Young* v. *Keighly*, 16 Ves. 353.

him to use due diligence. When called upon to perform his contract, he was bound to insist then upon the warranty, if it constituted any ingredient in the agreement. According to his own view of the case, he had, from the first, a right to say, that he ought not to be required to perform the agreement, till it was ascertained whether there was on the estate a given quantity of timber. He did not do so; and he cannot be allowed, after the proceedings which have taken place, to raise such a question now. *Durham* v. *Lyddell*,(a) *Norris* v. *Le Neve*,(b) *Lord Portsmouth* v. *Lord Effingham*,(c) *Bennett* v. *Lee*,(d) *Ord* v. *Noel*.(e)

What is to be deemed want of due diligence, if there is no laches in delaying, for more than eighteen months, to make any inquiry into a matter on which he conceived the rights and liabilities of both parties were to depend?

And, after all, in what respect could the new matter, if introduced into the cause, be material to the result? The prayer of the petition shows that the petitioner relies mainly upon the alleged warranty given by the auctioneer at the sale. The witnesses, who positively deny that any such warranty was given, are not only more numerous than the witnesses on the other side, but are more deserving of credit; because, while all of them had strong [*230] motives to attend to what passed at the *auction, they are less mixed up with the transaction, and have less interest, direct or indirect, in the result. The probabilities are on the same side. What vendor, who was not courting endless litigation, would ever think of warranting the number of loads of timber contained in woods of so great extent? But, if he were bold enough to venture upon such a warranty, would he not have endeavored to derive from it the most ample benefit, by giving it the greatest publicity, and inserting it in the conditions of sale? The copy of Lee's statement was sent to Hoggart, merely to show what the vendor conceived the quantity of timber to be; and the communication of it to Usborne amounted to nothing more than a representation of what the vendor believed on that subject. It was for Usborne to determine how far he should be influenced by it in his bidding. He is a person who has had a great experience in the purchase of woods; and he could not but be aware that no reliance can be placed on statements of the quantity of timber, unless the particular mode of measurement, and the mode of calculation founded on that measurement, were specified. One man measures in one way, and another in a different way, and slight diversities in the mode produce a great difference in the result. If all that is now set forth in the petition had been insisted on by the answer, the probability is, that a decree for specific performance would, nevertheless, have been pronounced.

In fact, the Vice-Chancellor has already decided the question, by allowing

(a) 4 Vin. Ab. 412. (b) 3 Atk 27, and 2 Bro. P. C. 73, Toml. edit.
(c) 1 Ves. sen. 430. (d) 2 Atk. 529. (e) 6 Mad. 130.

the demurrer to the bill which the petitioner filed, stating a case the same in substance with that which he now brings forward. The objection, that the bill was filed without leave, was not urged in the argument of the demurrer, and was not the foundation of the judgment. There is [*231] no appeal from the Vice-Chancellor's judgment; and that judgment is a *decision that Usborne ought not to be permitted to make a new case now.

Mr. *Bickersteth*, in reply:—It is a mistake to suppose that the relief sought by the petition, is a specific performance of the written contract with a parol variation. The prayer of the supplemental bill would be, that it might be declared that Partridge is not entitled to have the written contract specifically performed. In its nature, it would be a defence to the original suit.

There could be no laches in omitting to insist upon the representation and warranty as to the quantity of timber, till the petitioner had reason to believe that he had been deceived.

August 8.—THE LORD CHANCELLOR:—As to the question, whether, the matter brought forward by this petition not having been put in issue in the original cause, it is now competent for the petitioner to ask for the benefit of it by means of a supplemental bill in the nature of a bill of review, I am satisfied, by the discussion which has taken place, that, in a suit of this description, a party may apply for such relief as this petition prays.

It is clear that Usborne was unwilling to enter into any contract, until he knew what was the quantity of timber on the property; and, in consequence of his application, the auctioneer writes to his employers on the subject. They immediately send him the admeasurement: it was clearly sent for the purpose of being shown to persons who were likely to become purchasers; and it was accordingly shown by Hoggart to Usborne. *The [*232] circumstances of this part of the transaction satisfy me, that the paper was shown to Usborne as a statement of the quantity of timber on the property, to serve as a foundation for the contract he was about to enter into.

No laches can be imputed to Usborne. When one party to a contract makes a positive representation, it is not laches in the other not to proceed immediately to verify that representation. Until he has reason to doubt its accuracy, laches cannot commence.

The order made by his Lordship was, that the petitioner, upon depositing 50*l.* with the registrar, should be at liberty to file a supplemental bill in the nature of a bill of review, upon the new matter stated in his petition touching the warranty and otherwise, and for relief, as he should be advised; and that he should be at liberty to apply to have the original cause set down to be reheard, and to come on at the same time.

August 15.—A motion was now made on behalf of the defendant Usborne, that he might be at liberty, under the order of the 8th of August, to file his

supplemental bill in the nature of a bill of review, without previously performing the order made in the original cause on the 22d of January, and that all proceedings under the last mentioned order might be stayed; he undertaking to file such bill within one month, and offering to pay into the bank, to the credit of the cause, such sum as the court might think fit to order.

Mr. *Bickersteth*, Mr. *Knight*, and Mr. *Wigram*, for the motion:—

[*233] *The third and fourth of Lord Bacon's orders are in these words:(*a*) "No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as, if it be for land, that the possession be yielded; if it be for money, that the money be paid, if it be for evidences, that the evidences be brought in; and so in other cases, which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguisheth the party's right at the common law—as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like; those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court." According to the rule thus laid down, an objection may be taken to the regularity of our proceeding, if the bill be filed while the decree remains unperformed, unless the court give a special direction on the point. In an anonymous case,(*b*) it is said, "that it is a good plea in bar of a bill of review, that the former decree is not executed;" and in *Savil* v. *Darcey*,(*c*) the non-performance of the decree in the original cause was pleaded to the bill. In *Fitton* v. *Macclesfield*,(*d*) it is said, "that not bringing in writings according to the decree sought to be reversed, nor giving security for the costs in the bill of review, was pleaded in the cause between Okeover and Poole."

But it is clear that the court may dispense with the rule stated in Lord Bacon's orders, and may stay the execution of the decree, or any part of it; and there are many cases in which it has interposed for that purpose. It

[*234] did so in an old case of *Hall* v. *Hobb*.(*e*) In *Savil* v. *Darcey*,(*g*) "a decree having been obtained for a great sum of money, a bill of review was brought, and new matter assigned. The rule of court being pleaded, that the defendant ought first to pay the money, before the bill should be brought into court, the Lord Chancellor said, let him give good security for the money, and we will dispense with the rule." There the rule was dispensed with, merely because the sum was large. Here it is upwards of 65,000*l.*; and we are willing to give the best security, by paying into court the whole or any part of the amount. The doctrine of *Savil* v. *Darcey* is of the higher authority, because it seems to have proceeded on a decision of the house of lords; for the report concludes in these words: "The like case,

(*a*) Beames' Orders, 3, 4. (*b*) 12 Mod. 343. (*c*) 1 Chan. Ca 43..
(*d*) 2 Freeman, 97. (*e*) Tothill, 173. (*g*) 1 Chan. Ca. 43.

between Baston and Biron, by order of the house of peers, about 1662." In *Fitton* v. *Macclesfield*,(*a*) it is clear, from the report in Freeman, that the court was disposed to give full effect to Lord Bacon's orders; and yet(*b*) a bill of review was permitted to be filed without payment of the costs of the former suit, amounting to 150*l*., for which the plaintiff in the bill of review pretended that he had been in execution almost twenty years, and which, he alleged, he was not able to pay, "upon his making oath that he was not worth 40*l*. besides the matter in question, and besides a suit depending between the same parties to foreclose a mortgage." In 12 Mod.,(*c*) mention is made of a case of *Palmer* v. *Denby*, where, in the case of an executor, a bill of review was granted without execution of the decree. That no more recent instances of dispensing with the strict rule are to be found in the books, will not appear wonderful, when it is considered how small the number is of cases on bills of review, which have occurred within the last century.

*It is clear, therefore, that the court has often done what we now [*235] ask; and the only question is, whether the circumstances of the present case render the application reasonable. Permission having been given to file a bill of review, the whole question on the merits remains in doubt: but that very permission is a presumption that it is more than probable that Usborne will succeed; and if he does succeed, not only will he have nothing to pay, but he will have a large deposit to receive. Under such circumstances, is it reasonable that he should be compelled to pay to Partridge a sum of 65,000*l*.? Irreparable mischief may be the consequence of such a proceeding; for if once the money goes into Partridge's hands, various circumstances may render it difficult, or even impossible, to get it back. If Partridge should die, or become insolvent, or quit the country, what effectual remedy could Usborne have?(*d*)

(*a*) 2 Freeman, 97. (*b*) 1 Vern. 264. (*c*) 343.

(*d*) The following are the particulars with respect to the unreported cases referred to in the argument, which were ascertained by subsequent investigation, and submitted to the Lord Chancellor:—

Cock *v.* Hobs.

An order of the 5th June, 1631, states "that the defendant, by the negligent carriage of the plaintiff's solicitor, obtained a decree against the plaintiff for 1000*l*. and upwards; that afterwards the plaintiff filed his bill of review against the said decree, but the defendant, living at Amsterdam, could not be compelled to answer the same; and that if the plaintiff should pay the money decreed, he would be without relief, in case the court should reverse the decree;" and it directs, "that all proceedings on the decree should be stayed, until the defendant should answer the bill of review, or the court make other order to the contrary."

Reg. Lib. A. 630.

An order of the 14th December, 1632, under the title of *Hall* v. *Hobb*, is as follows:—

"Upon opening the matter by the defendant's counsel, it was alleged, that, the defendant having a decree of this court against the plaintiff for 1066*l*., the plaintiffs exhibited their bill to review the said decree, having yielded no obedience thereto, but standing under contempt and proclamation of rebellion for non-performance thereof; whereupon, the defendant being at Amsterdam, a commission was issued to take his plea, answer, or demurrer; and such commission being returned, and the defen-

[*236] *Mr. *Sugden*, Mr. *Preston*, and Mr. *Koe*, contra:—The orders, which require a party to perform the decree, before he files a bill of

dant's demurrer upon the point aforesaid being referred to Master Page, the plaintiff would make use of the order of June last to discharge the general order of the court, that no bill of review of a decree for payment of money ought to be admitted until the money be paid; whereupon it was ordered, that unless the plaintiff should, before Candlemas day next, bring the said money decreed into court, the plaintiff's said bill of review should be absolutely dismissed."

Reg. Lib. 1632, A. fo. 209.

An order of the 29th January, 1632, under the title of *Cocke* v. *Hobb*, after stating the order of the 14th of December, and reciting that "the court was informed by the plaintiff's counsel that he was no way able to bring the money into court, but was willing to give good security to abide what order the court should thereafter make upon the bill of review," directs, "that, upon the said Cocke putting in security, such as Sir Edward Walter, one, &c. shall allow of, to stand to such order as this court shall hereafter make against the said Cocke upon the hearing of the cause upon the said bill of review, the defendant's solicitor should forthwith put in an answer for the defendant to the said bill of review, without oath; and that all further proceedings upon the said decree, as against Cocke, after such security put in should stay; and the said Cocke was to proceed with effect to bring the cause to hearing upon the said bill of review."

Reg. Lib. A. fo. 273.

BAYLSTONE *v.* BIRON.

20th May, 1653.—A decree was made, that the plaintiffs were entitled to have redemption of the premises in question upon payment of the mortgage money and damages; and that the defendant should reassure the mortgaged premises to the plaintiffs, an account for mesne profits.

Reg. Lib. 1081.

28th May, 1655.—On a motion to commit the defendant for not executing the reassurance, an order was made, which, after stating "that the defendant's counsel alleged that he had exhibited a bill of review, and that if the defendant should reassure the lease in question, it would extinguish the right, and, therefore, prayed a stay of execution of the decree," directed, "that it be referred to the master to see and certify whether the defendant had performed the decree, save what extinguished his right; and if all else be performed, then all further proceedings touching the said defendant's assuring the said lease to the plaintiffs were to stay, and the defendant was to pay the costs of prosecuting the decree to that time; and it was decreed, unless the defendant should show cause to the contrary, that the defendant should assure the lease to the antientest six clerk not toward the cause, by such assurance as the master should direct."

Reg. Lib. 1298.

On the 2d of June, 1655, it was ordered, "that the defendant should forthwith assure the said lease to the antientest six clerk not toward the cause, in trust to be disposed of as the court, upon the hearing of the cause upon the defendant's bill of review, should think fit: and the defendant was not to be admitted to such bill of review, before he should make and execute the assurance before directed."

Reg. Lib. A. 928.

An order of the 9th of October, 1656, after reciting the order of the 28th of May, 1655, states, "that the mesne profits of the lands in question since August, 1647, which the defendant had been decreed to pay to the plaintiff, amounted to 1955*l.* 11*s.* 8*d.*; that the defendant had not yet performed the decree in those parts which did not extinguish the right; that it was, therefore, prayed by the plaintiffs' counsel that the six clerk might assign the lease to the plaintiff; that the defendant's counsel alleged that the plaintiffs had not answered the bill of review, and that the 1955*l.* 11*s.* 8*d.* was not settled to be paid, when the bill of review was exhibited; to which the counsel for the plaintiffs replied, that they had never been served with process to answer the bill of review, neither was the de-

review to impeach it, are expressed in the most peremptory language, and the practice of the court has been in conformity to them. *In [*237] *Williams* v. *Mellish*,(a) a motion being made, that proceedings on

(a) 1 Vern. 117.

cree performed by the defendant in what did not extinguish the right, before the bill of review was exhibited, as by the course of the court ought to have been done :" and it is thereby ordered, that, " if the defendant shall not pay to the plaintiffs the said money decreed by Lady day next, the six clerk should assign the lease to the plaintiffs ; but that conveyance was to be without prejudice to the bill of review ; and in the mean time the court left the plaintiff at liberty to prosecute the defendant on the decree for the money decreed."

Reg. Lib. A, 1570.

28th of January, 1663.—The Lord Chancellor, assisted by the two chief justices and the chief baron, dismissed the bill of review on the merits.

Reg. Lib. fo. 350.

Though this case is referred to in *Savil* v. *Darcy* as an authority for dispensing with the rule "by order of the house of lords about 1662," the following appears to be the only entry concerning it in the journals of the house of lords :—" Next the house took into consideration the report from the committee for petitions concerning William Byron, whose case was offered to the house for their further direction therein, it being concerning the reversal of a decree in chancery, or having a rehearing without performance of the decree. It is ordered that the Lord Chancellor do proceed therein according as he shall think fit, upon view of the precedents in the court of chancery."—Journals, vol. xi. p. 87.—11th of July, 12 Car. 2.

PALMES *v.* DANBY.

March 8, 1685.—A decree was made that Danby should account for the rents and profits of certain real estates, and for the personal estate therein mentioned, and should give security for the sum of 3210*l.* and what should be due on taking the said accounts.

On the 8th of June, 1686, that decree was affirmed on a re-hearing. After this, and before any account was taken, Danby died, being in contempt for not performing the decree.

In 1695 the plaintiffs Palmes and his wife (she being the administratrix of Danby) brought their bill of review against the defendant Sir A. Danby, to review and reverse the decrees of the 8th of March, 1685, and 8th of June, 1686. To this bill Sir A. Danby put in a plea and demurrer, and assigned for cause of demurrer, (amongst other causes,)(*) " For that it is not surmised or pretended by the now complainants that the said Marquis Danby did in his lifetime, or that the said complainants or either of them, since his decease, have brought into this court the said 3210*l.* or any part thereof, or given any security to answer and pay what should be due on the said account so decreed as aforesaid, or yielded any obedience thereunto, as they ought to have done by the rule and practice of this honorable court, before they can be admitted to bring a bill of review.

On the 19th of January, 1697, it was ordered that the plea and demurrer to the bill of review do stand overruled, and that the plaintiffs be at liberty to apply for a rehearing of the original cause, notwithstanding the inrolment of the decree.

Reg. Lib. B. fo. 134.

The plaintiffs petitioned for and obtained an order to rehear the original cause ; and on the 17th, 18th, and 19th of January, 1700, " the pleadings in the cause, as also the several errors assigned by the plaintiffs for reversing the original decrees being opened," the Lord Chancellor (Somers,) on the 6th of May, 1701, made a decree upon the whole matter.

Reg. Lib. 1700, B. fo. 362.

(*) Extracted from the original record in the Tower.

into court, and he prayed therefore that he might be allowed to give security; and the court, considering all the circumstances of the case, ultimately gave him leave to give security instead of paying the money into court. That case came three successive times before the court; the circumstances of it were very special; and, perhaps, if the rule could with propriety be relaxed on any occasion, that was a case in which it was fit that the strict observance of it should be dispensed with.

The next case to which I have been referred, was *Balstone* v. *Biron*, which was supposed to have been decided in the house of lords; but, on examination, it does not appear—at least that part of it does not appear—to have come before that tribunal. In *Balstone* v. *Biron*, the defendant in the original suit was directed to reassure certain mortgaged premises to the plaintiff. He objected, that to do so would extinguish his right, and he therefore prayed, that the part of the decree, which directed the conveyance, might for [*248] the present be dispensed *with. The case came before the court on several occasions; and ultimately an order was pronounced, that the assurance should be made to one of the clerks in court, in trust for the person who, on the final issue of the cause, might be held to be entitled. That was a case, therefore, in which the court dispensed with the order; it occurred in the year 1655; the circumstances were very special; and the object was to prevent a failure of justice.

A third case, which has been referred to, is *Savil* v. *Darcy*, decided in the year 1662, and reported in Cases in Chancery. The note of it is very short. It was a decree for the payment of a sum of money, and the court dispensed with the order, and directed security to be given for the payment of the money: founding its judgment on the decision in *Balstone* v. *Biron*, in which case it was stated that the rule had been dispensed with. The particular circumstances of *Saville* v. *Darcy* are not detailed; nothing appears upon the report, except simply the fact that the decree was for the payment of a large sum of money, and that the court founded its decision on the case of *Balstone* v. *Biron*, which, we have seen, proceeded on special circumstances. It is not improbable that the case of *Saville* v. *Darcy*, although the facts are not stated, had in it some special circumstances to justify the judgment of the court. That, I would remark, is the only case which is open to the observation that was made at the bar, of its being a judgment pronounced immediately after the restoration, and therefore not entitled to much weight. It was decided by Lord Clarendon.

The next authority in point of date is *Williams* v. *Mellish*, decided by Lord Keeper North. In that case the learned judge said, that he [*249 would see the original *decree performed to a tittle, before he would allow a bill of review to be filed. The party, it would appear, had pleaded his poverty, and his utter inability to pay the money; but the court, before it would dispense with the rule, required, in the first instance, an affidavit that he was not able to perform the decree; and further, that he

should surrender himself a prisoner in the Fleet, there to remain in custody until the decision should be pronounced upon the bill of review. Upon those terms, and those terms only, would the Lord Keeper consent to dispense with the order.

The next case is *Fitton* v. *The Earl of Macclesfield*, decided before the same learned judge, in the year 1684. There also the party set up his inability, on account of poverty, to perform the original decree, and the court insisted, that, before it dispensed with the order, he should make oath that he was not worth 40*l*., besides the matter in dispute in the cause.

Another case referred to was *Palmes* v. *Danby*, decided in the year 1695, and which was repeatedly before the court. In *Palms* v. *Danby* the objection was raised upon the record by demurrer, and the court overruled the demurrer; but it does not appear what were the particular circumstances which led to the decision.

Since that time—a period of more than a century—it does not appear that there are any other decisions relative to the point; so that in no instance, during a hundred years, has the rule in this respect been dispensed with; an observation, however, which would be entitled to much greater weight, were it not for another obervation which was made at the bar, that very few *instances have occurred during that period of bills of review [*250] having been allowed to be filed.

On the whole, it appears to me that the court has upon all occasions been extremely jealous not to allow the rule to be dispensed with; because in all the cases,—at least in almost all the cases—to which I have referred, the permission to file a bill of review without performing the decree in the original suit, was founded on very particular and special circumstances; and it seemed absolutely necessary, in almost every one of those instances, that the rule should be dispensed with; otherwise the party would not have been capable of receiving any benefit from his bill of review.

That brings me to the consideration of the question, whether there are in this case circumstances to justify the court in dispensing with the rule. After having attentively considered the facts of the case, bestowing upon it the best attention that I am able to direct to it, I think that, independently of the large amount of the sum, there are not circumstances which would lead the court to interpose; and I do not think that the single consideration of the amount of the sum at stake can justify the court in interposing for the purpose of dispensing with this erder. With respect, therefore, to the original motion, I am of opinion that it cannot be granted.

That brings me to the consideration of the motion that the bill should be taken off the file. It was stated that the circumstance of filing the bill of review before the original motion was disposed of, was in the nature of a contempt of the authority of this court. I am quite sure that it was not so intended; I am quite *satisfied that the party putting that bill on [*251] the file meant only to assert what he considered his just right. The

argument, which has been urged in support of what he has done, is this: that, even if the court had, before the filing of the bill, pronounced the decision which I have now pronounced on the first motion, the putting the bill upon the file would not have been in the slightest degree at variance with that decision, or inconsistent with it. They say, that the true interpretation of Lord Bacon's order is this—that, before you are entitled to file your bill of review, you must perform so much of the decree as your adversary can show that you are at that time bound to perform; and, after considering the order, and the nature of the subject, I am of opinion that such is the true construction of the order. Whatever the party is bound to do at the time when the bill of review is put upon the file, all that he must do before the bill is filed. But, as the permission to file a bill of review is always given upon the assumption, and the implied understanding and engagement, that the original decree shall be performed, I am also of opinion, that, if, after the bill is filed, the period arrives when money ought to be paid, it is incumbent upon the party to pay that money; otherwise an application to dismiss the bill may be made to the court on that ground,—he having filed the bill upon an understanding and engagement which he has failed to comply with.

Thus it becomes necessary to consider the particular position of the cause. By the terms of the decree, the defendant in the original suit is bound to pay the stipulated residue of the purchase money, amounting to 65,000*l.* and upwards; but he is not bound to pay that money, till the deed of conveyance is executed, till the execution is certified by the master, and till the con-
[*252] veyance and *title deeds are delivered; he is not bound to pay the money, till these things have been done; and these things are to be done in the first instance by the plaintiff in the original suit. If I was satisfied that the plaintiff had done what it was necessary for him to do in the first instance, in order to put the other party in default for not paying the money, there would be an end of the case: but how does the evidence in this respect stand before the court? The party who makes the motion to have the bill taken off the file, must himself establish his case. I look, therefore, at the affidavit upon which this motion is founded. The only allegation in the affidavit applicable to this point is, that the defendant in the original suit has not yet performed the decree. He may not have performed the decree, because it may not have been requisite for him to do any thing. If it was incumbent upon the plaintiff in the original suit to do certain things, before the defendant could be required to pay the money, it is not sufficient to allege in the affidavit that the decree has not been performed: it ought to show that there had been default on the part of the defendant. Now nothing of that sort appears upon the face of the affidavit.

Looking, therefore, at the mere allegation in the affidavit, that the defendant has not performed the decree, and finding, upon adverting to the decree itself, that the defendant is not bound to pay the money, until certain acts are done by the plaintiff; finding no statement in the affidavit that those acts

have been done; considering the *onus* of proof to be thrown upon the party making the application to have the bill taken off the file; I am of opinion that a sufficient case has not been made out to sustain that motion. It does not appear to me that there has been any default on the part of the plaintiff in the new suit; it does not appear to me, that, at the time *when the bill was put upon the file, it was incumbent upon him [*253] to have paid the money. As that does not appear, I think there is not sufficient to justify me, upon the facts as they now stand, to direct the bill to be taken off the file.[1]

If it should turn out, however, upon the result of inquiry, when the period for the payment of the money shall arrive,—or now, if the period has already arrived,—that the money has not been paid, and an application is made to me founded on the default, that would lead me to a different consideration of the subject; and I might, under those circumstances, direct that no further proceedings should take place under the bill of review, till the money was paid.

The present motions must be dismissed; and the justice of the case is, that, both motions being dismissed, the costs of each should follow the fate of the application.[2]

The suit was ultimately terminated by a compromise.

[1] A plea, which had been improperly and vexatiously filed, was, under the circumstances of the case, ordered to be taken off the file, *Brooks* v. *Purton*, 1 Yo. & Coll. C. C. 279. And see *Livesey* v. *Livesey*, 1 Russ. & M. 10.

[2] As to what is a supplemental bill, in the nature of a bill of review, see *Hodson* v. *Ball*, 11 Sim 456. As to the bill in that case, Shadwell, V. C., observes: "In effect, therefore, this bill does ask that a decree may be made, which is inconsistent with the original decree; and, therefore, although it does not mention the term 'review,' yet it is to all intents and purposes, a supplemental bill in the nature of a bill of review; and, consequently, it ought not to have been filed without the leave of the court; and the leave of the court was never asked." Then as to the motion to take the bill off the file, the Vice-Chancellor (p. 462,) proceeds,—the passage is introduced in full, as furnishing a commentary on the case in the text—"The only point that remains to be considered is, whether the application [to take the supplemental bill in the nature of a bill of review off the file] is right in point of form? Now it is observable that the present Lord Chancellor, [Lyndhurst] when he gave judgment in that very singular case of *Partridge* v. *Usborne*, says, speaking of the case of *Palmes* v. *Danby*, which was decided in 1795, [1695]: 'since that time—a period of more than a century—it does not appear that there are any other decisions relative to the point,' that is, the filing of a bill of review. So that, in no instance, for above one hundred years, has the rule, in this respect, been dispensed with. It is certainly very true that very little in the way of decision is to be found respecting bills of review, after a period of nearly a century back; and therefore, a question might well arise as to what is the proper course to be pursued.—Now Lord Eldon, in the case of *Perry* v. *Phelips*, (17 Ves. 173,) has certainly expressed his opinion as to what the course of proceeding ought to be; although I admit that there has been a mistake made either by Lord Eldon, with reference to what had been done in *Young* v. *Keighly*, (16 Ves. 348,) or by the reporter. There is, however, no ground for supposing that Lord Eldon did not say: 'It must be open to plea or demurrer, if known to the forms of the court; or, as in the late case of *Young* v. *Keighly*, to an application that it may be taken off the file.' In *Partridge* v. *Usborne* there had been a discussion before the Lord Chancellor, whether or not there should be leave given to file a supplemental bill, in the nature of a bill of review. The

[*254] *CORBET *v.* CORBET.(*a*)

1827; Dec. 15, 17. 1828; October.

A., being tenant for life of certain lands, remainder to his first and other sons in tail male, remainder over, upon his marriage with an infant, by a settlement to which her father was a party, granted a rent charge issuing out of part of these lands to trustees for her, by way of jointure and in lieu of dower; and subsequently, during the coverture, this rent charge was confirmed by the person, who, upon failure of issue male of A., would be entitled to the property; there were no sons of the marriage: Held, that the widow of A. was in equity barred of her dower.

By indentures of the 13th and 14th of January, 1758, certain lands, after some previous limitations, which had either failed or expired, were limited to Edward Corbet for life; remainder to his first and other sons in tail male; remainder to Pryce Maurice for life; remainder to his first and other sons in tail male, with divers remainders over; and in the release was contained a power to each person, who should be entitled in possession under the limitations, to grant and assure as a jointure unto any wife whom he should marry, such part of the estates as he should think fit, provided the jointure did not exceed the sum of 10*l.* a year for every 100*l.* of the woman's fortune, and that her fortune was settled and applied as therein mentioned.

In 1813, Edward Corbet made a proposal of marriage to the plaintiff, Jane Thomas, who was then about nineteen years of age, offering to settle upon her a rent charge of 100*l.* a year, to be issuing out of an estate called Eskyan, which was part of the settled property. Miss Thomas and her father, who were persons in a very humble situation of life, acceded to the proposed terms.

(*a*) 1 Sim. & Stu. 612.

Lord Chancellor reserved his judgment upon the point; and before he had decided it, the plaintiff took upon himself to file a supplemental bill, in the nature of a bill of review; whereupon a motion was made that that bill might be taken off the file. Now I observe that, throughout the argument which was adduced on the part of the plaintiff against that motion, it is not once suggested that the motion itself was wrong in point of form; and when the Lord Chancellor gives his judgment upon the motion, he throws out not one word indicating an opinion that the motion was wrong in point of form; and, therefore, I conceive that the course that was adopted by the parties in *Partridge* v. *Usborne*, as well as the expression of Ld. Eldon, do warrant the application, namely, to take the bill off the file." The order of the Vice-Chancellor was affirmed by Lord Lyndhurst, December, 1842. 1 Phillips, 177. The Lord Chancellor says, (p. 189,) "a bill has been put upon the file contrary to the practice of the court. It is an improper proceeding; it has been improperly put upon the file. What is a more just, natural, or proper remedy than to take it off the file?" His lordship then reviews the cases of *Milligan* v. *Mitchell*, 1 Myl. & Cr. 433, and *Perry* v. *Phelips*, 17 Ves. 173; and proceeds to notice his own decision in the principal case:—"Then came the case before me of *Partridge* v. *Usborne*, which was argued at great length, and in which a great number of important points were agitated; but it never occurred to any of the gentlemen at the bar who argued that case—men of great experience—to take any objection to the course, proposed to be adopted, of taking the bill off the file. So that I apprehend, upon principle and upon the authorities to which I have referred, the proper course of proceeding, in a case like this, is to order the bill to be taken off the file."

Accordingly, by an indenture dated the 14th of September, 1813, made between Edward Corbet of the first part; Robert Thomas, and his daughter Jane Thomas, of the second part; and Pryce Williams, and Richard Pugh of the third part; Edward Corbet, in consideration of the intended marriage, granted to Williams and Pugh, their executors, administrators, and assigns, a yearly *rent charge of 100*l.* during the natural life of Jane [*255] Thomas, in case she should survive him, Edward Corbet, payable quarterly on specified days, and to be issuing out of the premises called Eskyan, with powers of entry and distress; and for better securing the annuity, Edward Corbet, in exercise of the power contained in the indentures of 1758, and of all other powers and authorities enabling him so to do, demised the premises called Eskyan to Williams and Pugh for ninety-nine years, if Jane Thomas should so long live, upon trust, in case Jane Thomas should survive him, Edward Corbet, to pay to her the rent charge of 100*l.*, which was declared to be in lieu and satisfaction of her dower.

The marriage was shortly afterwards solemnized. As the wife had no fortune, the deed of September, 1813, was not a due execution of the power of jointuring given by the deed of 1758; and the jointure, which it purported to assure, was void as against the persons entitled in remainder. But in 1819, there being no issue of the marriage except a daughter, Edward Corbet, and the person who had the first vested estate tail in remainder expectant on the death of Corbet without male issue, joined in suffering a common recovery; and by a deed, to which the trustees of the term for securing the payment of the rent charge were parties, the recovery was declared to enure to the use, that the wife should, during her life, receive the rent charge of 100*l.*; and to secure the payment of it, a term of ninety-nine years was limited to her trustees Williams and Pugh.

The husband died without issue male; and the bill was filed by the widow, to have dower assigned to her out of certain lands, of which the husband died seised for an estate of inheritance.

*The question was, whether the wife's right of dower was barred [*256] by the grant of a rent charge, which was originally invalid, and which even after confirmation by the recovery, would still have been invalid as against a son of the marriage.

THE VICE-CHANCELLOR (Sir John Leach) was of opinion that she was barred, and dismissed the bill.

The plaintiff appealed.

Mr. *Sugden* and Mr. *J. Martin*, for the appellant.

Mr. *Fonblanque* and Mr. *Temple*, for the defendant.

The same cases were cited, and the same topics urged on the hearing of the appeal, as in the argument before the Vice-Chancellor, reported in 1 Sim. & Stu. 612.

1828; *October*.—THE LORD CHANCELLOR:—I concur in the view taken

of this question by the present Master of the Rolls, when sitting as Vice-Chancellor. In the case of a jointure at law, if the widow be lawfully expelled or evicted, she is, by the statute, entitled to be endowed of so much of the residue of her husband's lands, of which she was before dowable, as the lands from which she is so expelled shall amount to.

It follows, therefore, that if a title originally defective be made good, so as to prevent such eviction, this will be sufficient to render the jointure binding; and there is no inconvenience in this rule, for the right to dower thus becomes a security for the enjoyment of the jointure. If this be so, in [*257] the case of a jointure at law, the same *rule must prevail where the jointure is equitable, provided, in the case of an infant, it has the assent of the parent or guardian.[1] In the present instance, the original defect has been cured, and there is nothing to prevent the widow from having the full benefit of the settlement.

The case of *Carruthers* v. *Carruthers*(*a*) was cited in the argument; but the decision in that case does not appear to me to bear upon the present question. There, by the terms of the settlement, the widow might, if it had been held good, have remained without any provision during her life; for the prior tenant for life might have outlived her. This, at law, would have been a fatal objection; and the court held, that the same rule would apply in equity, in the case of an infant female, notwithstanding the assent of her guardian.

It is charged in the bill, in the present case, that the original settlement was fraudulent, and the fraudulent nature of the transaction was insisted upon at the bar; but there was no evidence, and nothing, as it appears to me, in the circumstances of the case, to maintain such a charge; and with respect to what was urged as to the supposed inadequacy of the provision, it not only forms no part of the complaint, but was wholly unsupported by proofs. It is unnecessary, therefore, to enter further into this part of the subject.

The appeal must be dismissed; but, I think, without costs.

(*a*) 4 Bro. C. C. 500.

[1] By the Revised Statutes of N. Y. (Vol. 1, 2d ed. p. 733. § 9.) "Whenever an estate shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower of such wife, in any lands of the husband." And by § 2. "The assent of the wife to such jointure shall be evidenced, if she be of full age, by her becoming a party to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian, in such conveyance." Et vide *McCartee* v. *Teller*, 2 Paige 559. 1 Sim. & Stu. 621. n. 1.

*GARDNER *v.* ROWE.(*a*) [*258]

1827; November 26, 27. 1828; October.

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly: a bill was filed on behalf of the creditors of Wilkinson under the commission, claiming the lease as part of his estate; and the court directed an issue to try whether W's. name was used in the lease as a trustee for R.: Held,

That the issue was properly directed.

The jury having found a verdict in the affirmative: Held,

That the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to Wilkinson's assignee.

By an indenture dated the 23d of January, 1812, the Earl of Mount Edgecumbe demised and granted unto George Wilkinson, his executors, administrators, and assigns, a piece of ground known by the name of the Wheal Regent Sett, with liberty to dig, work, raise, and search for tin, lead, and other minerals in and throughout the same during the term of twenty-one years, at the rent and subject to the covenants mentioned in the lease.

On the 23d of Aug. 1813, Wilkinson executed a deed, which stated that his name had been used in the lease from Lord Mount Edgecumbe as a trustee for Joshua Rowe, and declared the trust accordingly. Wilkinson had previously committed acts of bankruptcy. On the 13th of November following, a commission issued against him, under which he was found a bankrupt.

The bill alleged, that the lease of the mine had been granted originally to Wilkinson for his own benefit, and that the declaration of trust had been executed fraudulently with a view to protect Rowe from being a loser by Wilkinson's insolvency. The prayer was, that the deed of the 23d of August, 1813, might be delivered up to be cancelled, and that the mine might be declared to be part of the bankrupt's estate.

Rowe, by his answer, denied all the material allegations of the bill. Being engaged, he stated, about *1811, in working the Great Crinnis [*259] Mine, his personal observations on the nature of the soil and the directions of the veins of ore, led him to believe it would be a profitable speculation to open a mine in the neighborhood, and work it in connection with the Great Crinnis Mine; and with this view his agent entered into an arrangement with Lord Mount Edgecumbe for the lease of the Wheal Regent Sett. But as the success of the Great Crinnis Mine had induced other adventurers to set up claims to it, which they were seeking to enforce by a bill in equity, he deemed it prudent that the lease should be taken in the name of a trustee, rather than in his own name, in order that the new speculation might not be involved in the litigation. Wilkinson had the reputation of being a man of large property, and was connected with Rowe by marriage.

(*a*) 2 Sim. & Stu. 346.

Under these circumstances, he was selected to be the trustee, and the lease or grant was made out in his name; but the mine had been worked under Rowe's direction, and at Rowe's expense.

The cause having come on to be heard before the Vice-Chancellor, the plaintiffs contended for two points: first, that in fact Wilkinson was not a trustee for Rowe, but that the lease, when granted by Lord Mount Edgecumbe, was meant to be Wilkinson's own property, and that consequently the deed of the 23d of August, being an attempt by Wilkinson after his bankruptcy to divest the beneficial interest out of his assignees, and transfer it to Rowe, was altogether fraudulent and void; and, secondly, that even if the true agreement of the parties at the time of granting the lease was, that Wilkinson's name should be used as a trustee for Rowe, yet that trust could not now prevail, inasmuch as there was no written declaration of trust within the statute of frauds, except the indenture of the 23d of August, 1813,

[*260] *which, being executed after the bankruptcy of Wilkinson, could not affect the legal title of the assignees.

The Vice-Chancellor was of opinion that he could not enter into the consideration of the second point, which raised a pure question of law, till the matter of fact involved in the first point was ascertained. He therefore directed an issue to try whether the name of Wilkinson was used in the lease of the 23d of January, 1812, as a trustee for Rowe.

The jury found a verdict in the affirmative.

The plaintiffs afterwards moved for a new trial, but the Vice-Chancellor refused the application. The case then came on to be heard on the equity reserved; and the Vice-Chancellor, being of opinion that the indenture of the 23d of August, 1813, though executed after bankruptcy, was a good declaration of trust within the statute of frauds, dismissed the bill with costs.(*a*)

The plaintiffs now appealed from all the three decretal orders—the decree directing the issue, the order refusing the motion for a new trial, and the decree of dismissal.

1827; *November* 26, 27.—Mr. *Agar*, Mr. *Rose*, and Mr. *Matthews* for the appellants.

Sir Charles Wetherell, Mr. *Pepys*, Mr. *Montagu*, and Mr. *Knight*, contra.

It was argued against the original decree, directing the issue, that it was contrary to law to direct an issue to try whether Wilkinson was a trustee of the lease for Rowe. In *Yates* v. *Hambly*,(*b*) Lord Hardwicke says,

[*261] *" As to the five houses, I am of opinion the defendant W. Hambly is entitled to an absolute estate, though it is an exceeding dark transaction; but yet it is not proper to direct an issue to try a trust, nor do I remember any instance of it; for as it depends upon the statute of frauds and perjuries, it is incumbent upon this court to determine it." Whether Wilkin-

(*a*) 2 Sim. & Stu. 346. (*b*) 2 Atk. 364.

son was or was not a trustee for Rowe, depends upon this single circumstance, whether there was a declaratiou of trust in writing signed by him before his bankruptcy: if there was not such a declaration of trust, there could not be any valid trust in existence. Trust or no trust, was a question which ought to be determined by the court itself, and could not be made the subject of an issue.

On the question, whether the deed of the 23d of August, 1813, was a valid declaration of trust, the argument was to the same effect with that which is contained in the report of the case before the Vice-Chancellor.

1828; *October*.—The Lord Chancellor:—This was an appeal from three orders pronounced by the late Vice-Chancellor. The principal point insisted upon, on the part of the defendants, related to the deed executed by Wilkinson, containing the declaration of trust, and which, being executed after he had committed an act of bankruptcy, was contended to be inoperative and void. The case upon this point was fully argued before the Vice-Chancellor, and I see no reason to differ from the opinion expressed upon it by that learned judge. Assuming the bankrupt to have been a trustee for Mr. Rowe, there was nothing, I think, to prevent him from making a valid declaration of trust, notwithstanding his bankruptcy.

*It is true, that the property of a trader cannot be assigned by him [*262] after his bankruptcy: the property is no longer his; it is vested in his assignees. But property held in trust, is not the property of the bankrupt; it does not pass to his assignees.[1] The only question therefore, as it appears to me, in this case is, whether the declaration contained in the deed was founded upon a previous trust, or was altogether fraudulent. That question, however, has been decided in substance by the jury upon the trial of the issue: for they have found that the name of Wilkinson was used in the original deed as a trustee for Rowe.

It was further contended, that the order directing the issue ought not to have been made: and from that order the defendants have also appealed. The issue was directed in March, 1822, for a trial at the summer assizes. The trial was delayed until the following spring; and, upon the verdict being found for the plaintiff Rowe, an application was made for a new trial;

[1] That a *bona fide* assignment of goods, by a debtor who afterwards, but before the delivery of the goods, became bankrupt, to his creditor, may under the circumstances of the case, prevail in equity against the legal right of the assignees, appears from the following case:—A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A. under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy; it was held that C. had a good title in equity to the goods. The point had been previously decided, at law in favor of the assignees; but the rules of law and equity were, Lord Cottenham said, "known not to be the same on this subject." *Burn* v. *Carvalho*, 4 Myl. & Cr. 690, 699, 702. S. C. 7 Sim. 109.

and it was not till after that application had failed, and a subsequent delay of two years, that the defendants appealed against the order directing the issue. They take the chance of a verdict in their favor, try the effect of a motion for a new trial, and, failing in both, they then, for the first time, object to the original order. I think, however, under the circumstances of this case, there is no ground of objection to the order directing the issue: and with respect to the motion for the new trial, I have read through the evidence, and the summing up of the learned judge who presided at the trial, and who appears to have given the defendants the full benefit of every observation in their favor, which the evidence afforded;—and after considering the whole case, I cannot say that I think the jury have erred in finding their verdict for the plaintiff.

[*263] *I am of opinion, therefore, that these appeals must be dismissed; and, as to the two first orders, with costs.[1]

Brummell *v.* M'Pherson.

1827; December 22. 1828; April 3, 16; October.

Moneys issued by the crown to an army agent for the pay, subsistence, &c. of officers, and carried in the books of the agent to the credit of the respective officers, but not paid over to them, and not made the subject of any private arrangement with them, continue the moneys of the crown in the hands of the agent, for which he is accountable to the crown; and may be called back by the attorney general, as representing the crown, even after a lapse of more than thirty years.

William Brummell had carried on the business of an army agent, first in partnership with a gentleman of the name of Bishop, and, after Bishop's death, on his own sole account. Brummell died in 1794; and a suit having been instituted to have his will established, and the trusts of it carried into execution, a decree was pronounced in 1795, which directed, among other things, the usual accounts of his debts. By a report, dated the 1st of August, 1810, the master certified that no debt had been proved before him; but that a claim had been established for public balances due from the estate of William Brummell in respect of certain regiments, some of which were in the agency of Messrs. Bishop & Brummell, and others in the agency of Wil-

[1] That an issue may be awarded to try the fact of the existence of a trust, appears from the unreported case of *Milner* v. *Singleton*, of which the following statement is given, 2 Yo. & Coll. C. C. 75, n. *d*: "In this case, Singleton had obtained a lease from the dean and chapter of York. Milner alleged that he had obtained it under a secret trust for himself. Singleton denied the imputed trust, and said that he took the lease in his own name and refused to give Milner the benefit of it, except upon his own terms, which Milner refused. Milner then filed his bill to establish the alleged agency of Singleton for him. The Vice-Chancellor of England in the first instance, and afterwards Lord Cottenham, C. directed issues to try the fact of agency, and directed both the plaintiff and defendant to be confronted before a jury. The issues were tried at York, in March, 1841, when a verdict was found on each issue for Milner."

liam Brummell alone. The amount due in respect of these balances was afterwards ascertained and paid. A fund was set apart to provide for any claim which might subsequently be discovered to exist against Bishop's estate, in respect of his agency accounts, or those of Bishop & Brummell; and by an order, dated the 21st of December, 1822, it was referred to the master to inquire, whether any and what further sum of money was due and owing from the estate of the testator, William Brummell, to the crown, in respect of the regiments in his agency, or in the agency of Messrs. Bishop & Brummell.

*The master, by his report, found, "that a party is appointed agent [*264] to a regiment by the colonel; that thereupon a power of attorney is usually executed by the colonel in favor of the agent, under which the latter is authorized to receive from the paymaster general of his majesty's forces, all such sums as may become due and payable to him (the colonel) or to the officers or soldiers of his regiment, or of any garrison, to the command of which he (the colonel) may thereafter be appointed, or on account of staff pay; that the agent is further authorized to execute and deliver assignments of the off-reckonings of the non-commissioned officers and privates, &c., to the command of whom the colonel may be appointed, to such persons as he may contract with for furnishing and supplying clothing and accoutrements, and, upon receipt of any sums of money, to give discharges, &c.; that when the agent requires money on account of a regiment, he states that fact to the war office, and the secretary at war, if he thinks the service requires it, directs the pay office to issue the money to the agent, who gives his receipt for the same to the paymaster general, by virtue of the power of attorney executed in his favor; and that it is customary for the agent to give security to the colonel for the moneys thus coming into his hands."

The master further found, "that, upon an investigation, in the year 1821, of the books of Messrs. Bishop & Brummell, on behalf of Brummell's representatives, it was admitted that a sum of 1154*l.* 11*s.* 3*d.* remained in their hands, arising from or in respect of moneys imprested into their hands for the subsistence and arrears of officers between December, 1783, and March, 1794; that it was also admitted that a sum of 619*l.* 12*s.* 5*d.* remained in the hands of Messrs. Bishop & Brummell, arising from or in respect of moneys issued for *allowances for camp equipage, marching [*265] rations, &c.; that, upon a recent examination of the books of Messrs. Bishop & Brummell, there appear to be further balances claimed by the crown to the amount of 464*l.* 1*s.* 11*d.*; that the said several balances had remained in the hands of Messrs. Bishop & Brummell, or of William Brummell after Bishop's death, for thirty years and upwards, without any claim or demand made in respect thereof by or on behalf of the officers to whose respective accounts such several balances or sums of money were carried, or their respective representatives, or any persons claiming under them."

The report concluded with the following finding:—"On consideration of

he several matters aforesaid, it appeared that no question arises as between the crown and the several officers to whose separate accounts such sums of money had from time to time been carried, inasmuch as he (the master) conceived, that, in whose hands soever such balances or sums of money, or so much thereof as had been imprested into the hands of the said agents, for arrears or subsistence of officers, shall in future remain, the same must still be liable to the claims of such several officers, or their representatives, or persons claiming under them; but the question is, whether such balances or sums of money should remain indefinitely in the hands of such agents, or should be paid over to his majesty, to be applied as his majesty shall think fit, but subject always to the claims of such officers, their representatives, or persons claiming under them, as they from time to time may be able to make out or establish such claims; and it did not appear to the said master that there is any legislative or official regulation immediately applicable to this question, but under all the circumstances, and having regard to the
[*266] several documents which had been laid before him, *and particularly as such balances or sums of money are part of sums originally issued by his majesty to the said agents for purposes to which they had not been applied, the master conceived, that although they cannot be considered as debts due to the crown, yet his majesty is entitled to call for an account of them, and to take them out of the hands in which they now remain, and to apply them in such manner as his majesty shall think fit, so that they remain subject to the claims of the several officers to whose accounts they have been respectively carried, or their representatives, or persons claiming under them, whenever they shall be able to make out and establish such claims."

The attorney general presented a petition, praying that the report might be confirmed, and the amount of the balance paid to his solicitor. There was a cross petition by the parties beneficially interested in the assets of Brummell, the object of which was to obtain a declaration that there was not any further sum due to the crown from the estate of their testator in respect of the regiments formerly in his agency or in the agency of Bishop & Brummell.

1826; *May* 24.—The petitions came on to be heard together before the Vice-Chancellor. The question was, whether the representatives of a deceased army agent were accountable to the crown for moneys which had remained in their hands under such circumstances as existed here; or whether they were accountable only to the officers to whose accounts the respective sums had been carried, and their representatives.

Mr. *Wray*, for the crown.

Mr. *Shadwell*, Mr. *Pepys*, and Mr. *Treslove*, contra.

[*267] *1826; *July* 7.—THE VICE-CHANCELLOR:—The first objection taken to the report of the master is, that it is wrong in point of form. The only matter, it is said, which the court referred to the master, was, to in-

quire whether any and what further sum of money was due to the crown from the testator; and the master, having stated it to be his opinion that the sums in question were not debts due to the crown, had no authority, under the language of the order, to proceed to find that his majesty was entitled to call for an account of those sums, and to take them out of the hands in which they now remain.

The substantial purpose of the court being that the master should inquire whether any and what further sum or sums were to be withdrawn from the assets of the testator, and paid over to the crown, the master would clearly have failed in his duty, if, entertaining on that point the opinion which he has expressed, he had omitted to state it in his report.

The substantial objection which has been urged against the report is, that the master has come to an erroneous conclusion, and ought not to have found that his majesty was entitled to call for an account of these sums, and to take them out of the hands where they now remain; for, being carried by the agent to the private accounts of the several officers, the agent was thereby as fully discharged, as against the crown, as if the money had been actually paid to the officers to whose accounts the sums were carried.

If it had been established before the master, that the sums in question were carried to the accounts of the several officers, in consequence of previous authority *given by them to the agent, authorizing him to [*268] carry all moneys payable to them to a private account between them respectively and the agent, in the nature of a banking account, it might then have been contended that the act of carrying the sum to the private accounts of the officers was in effect as much payment against the crown to the order of the officers, as if the agent had handed over those sums to any other banker whom they might have named. Such special circumstances, however, are altogether wanting in this case; and the question is to be decided upon general principles.

It is argued, that an army agent is not a public officer; that he is accountable—not to the crown—but only to the colonel of the regiment, from whom he receives his appointment; and that if moneys, imprested by the crown into the hands of the agent, remain unapplied, the remedy of the crown is against the colonel, and not against the agent: and in support of that argument it is said, that, by the twenty-fifth section of the 45 G. 3, c. 58, "for the better regulation of the office of paymaster-general, and the more regular payment of the army," it is provided, "that nothing herein contained shall extend to exonerate the colonel or commandant of any regiment, troop, or company, or the representatives of any such colonel or commandant from any responsibility to which he or they is, are, or may be liable, for any failure or deficiency of the respective agents of such regiments, troops, or companies."

I incline to think, that the very circumstance that money is imprested by the crown directly into the hands of the agent, would alone render the agent immediately accountable to the crown; and that the statute referred

[*269] *to, follows other statutes upon the same subject, in treating the agent of a regiment as directly accountable to the crown; though, inasmuch as the agent is appointed by the colonel, it has been deemed reasonable by the legislature, that the colonel also should continue responsible for the conduct of his own nominee.

Upon the whole, my opinion is, that, if money be imprested by the crown into the hands of an army agent, for the purpose of being paid to officers to whom it is due, and it is never demanded by them, and therefore is not paid by the agent, it remains the money of the crown in the hands of the agent, for which the agent is accountable to the crown. This court cannot permit those, who claim beneficially under the will of the agent, to divide this money amongst them as part of his assets; but must direct it to be returned to the crown. It makes no difference that such moneys were carried by the agent to the accounts of the officers, unless under special circumstances between the agent and the officer, such as I have before referred to, and which would be tantamount to actual payment to the officer. No such special circumstances are stated here.

It was objected against the crown, that the prayer of the petition of the attorney general was incorrect, inasmuch as it prayed that the sum in question might be paid to Mr. Maule, who is described as solicitor to the attorney general; whereas the moneys, if they are to be refunded, ought to be repaid to the exchequer, out of which they issued. The attorney general being the proper officer to assert the rights of the crown in this suit, he is the proper officer to receive the moneys; and payment to his solicitor is payment to him. The order, therefore, must be according to the prayer of the petition of the attorney general.

[*270] *The order was, that so much of the master's report, dated the 18th of April, 1826, as certified that his majesty was entitled to call for an account of the balances in the report mentioned, and to take them out of the hands in which they then remained, be confirmed; and directions were given for the payment of 2238*l.* 5*s.* 7*d.* to the solicitor of the attorney general, in satisfaction of the claim of the crown.

Against this order an appeal was presented by parties interested in Brummell's estate. Though the appeal prayed a declaration, that nothing was due from Brummell's estate to the crown, it was admitted in the course of the argument, that the sums of 619*l.* 12*s.* 5*d.*, and 464*l.* 1*s.* 11*d.*, could scarcely be considered otherwise than as in the nature of public balances; and these the executors were willing to refund: so that the discussion was confined principally to the liability of the executors to account for the sum of 1154*l.* 11*s.* 3*d.*, which consisted wholly of arrears due to officers for subsistence and pay.

1827; *Dec.* 22.—Mr. *Pepys*, Mr. *Treslove*, and Mr. *Pemberton*, for the appellants:—The question is, on whose behalf did Brummell receive these

moneys,—whether, as the agent of the crown, or as the agent of the officers to whom they were to be paid. The agent of a regiment is appointed by the colonel; he is accountable to the colonel; and the colonel is responsible for the moneys he receives. The paymaster general is the officer who acts on behalf of the government in issuing the sums requisite for each particular regiment; the payment is made to the colonel by the hands of his agent, and for the sums so paid, the colonel is answerable. There is no privity between the *crown and the agent. The crown, independently of [*271] statutory enactment, would have no rights against the agent; and though it has been found convenient to impose by act of parliament certain obligations on the agent, those regulations do not make him the agent of the crown. He stands in the same situation towards the colonel and officers of the regiment as before, with this difference only—that he is bound by positive law to do certain acts at the bidding or for the convenience of the crown, which, but for express enactment, could not have been required of him. Thus the 23 G. 3, c. 50, s. 35, and 36, directs the agents of regiments to render accounts to the war office, when called upon to do so; but in no part of that act are they recognized as the agents of the crown. Succeeding acts have extended the rights of the government against the agent. By the 45 G. 3, c. 38, agents of regiments are ordered, under a penalty of 100*l.* for every omission,(*a*) to make up and transmit to the office of the secretary at war, and the office of the paymaster general, annual accounts, showing the balance due to or from the public on account of every regiment, troop, and company, and also(*b*) to make up such other accounts as the secretary at war or paymaster general may require. The paymaster general is authorized(*c*) to require them to pay the balances due from them to the public; and those balances, if not paid within a month after such requisition, are to be deemed a debt to his majesty on record. A special and limited responsibility on the part of the agent towards the government has been thus created. But even in imposing this responsibility, care has been taken not to alter the general relative position of the crown, the colonel, and the agent: and accordingly, the 25th section provides, that nothing contained in the act shall extend to *exonerate the colonel or commandant from the responsibility [*272] to which he is liable.

Even if the 45 G. 3, c. 58, could be considered as having altered the situation of the agent to a regiment, so as to make him the agent of the crown, that would not affect the present case; for the moneys, which are now claimed, were received between 1783 and 1784, long before the act was in existence.

According to the course of dealing between the war office and the regimental agent, the latter makes up, for each year, a statement of the sum due to the regiment, and the moneys received on account of it; and, this state-

(*a*) Section 21. (*b*) Section 25. (*c*) Section 22.

ment having been examined and settled by the secretary at war, an instrument, called a clearing warrant, is issued, under which the net balance, due in respect of each regiment, is paid to the agent. The issuing of the clearing warrant puts a final close to all accounts between the government and the agent for the year to which it relates. That instrument is a solemn admission, that the sums mentioned in it are due to the regiment; they are paid to the agent on behalf of the regiment; the services, for which the payment is made, have been performed; the crown has no longer any interest in the moneys which it has parted with for the purpose of that payment; and all liability of the agent to the government is at an end.

We have a letter from the war office, dated in May, 1826, which states, that, in the event of an agent becoming bankrupt, the government does not hold itself answerable to officers for arrears of their pay left in the agent's hands. It must, therefore, be considered an admitted fact, that, if Brummell, instead of dying, had become bankrupt in 1794, the officers could not [*273] have claimed these arrears from the crown, but must have *proved against Brummell's estate. Now, if Brummell was the agent of the public, and not the agent of the colonel and officers, what right could the crown have to say, that the loss occasioned by his failure should be borne, not by the government, whose agent he is alleged to have been, but by the individuals whose agent it is said he never was. It is clear, that in 1794 these moneys were in the hands of Brummell on the account and at the risk of the several officers; the government was discharged towards the officers by the payment to Brummell: where then can the right be to call these moneys back at the end of thirty-four years?

There is an account between Brummell and the several officers for whom these sums were received: the sums due to each officer are entered to his credit in the account between him and Brummell; against these credits the officer draws as his occasions may require, and the amount of his drafts are placed to his debit. In such a state of circumstances the moneys became the absolute property of the officer to whose credit they were entered; and he might have maintained an action of assumpsit for them. *Smart* v. *Wolfe*,(a) *Row* v. *Dawson*,(b) *Priddy* v. *Rose*.(c) From the moment that the sums were carried to the credit of the officers, Brummell, in respect of these sums, became their private banker. The representative of any of those officers might still file a bill for an account against Brummell's executors; and the latter could not resist such a bill by setting up a settlement between them and the crown.

1828; *April* 3, 16.—Mr. *William Brougham*, for the crown:—Before 1783, the sum voted by parliament for a regiment, was issued to the [*274] colonel: an agent, appointed by *him, paid the officers and men, and made the other necessary disbursements; and no account of the ap-

(a) 3 T. R. 323. (b) 1 Ves. sen. 331. (c) 3 Mer. 86.

plication of the moneys was rendered to the government. To remedy this defect, Mr. Burke, in 1783, introduced a bill "for regulating the office of paymaster general, and for the more regular payment of the army;"(*a*) and by that act(*b*) army agents were required to make up and render certain accounts. It then became the practice to have in each regiment a regimental paymaster, who received a salary of 120*l.* a year from government, but was not recognized as a public accountant, till 1798. During this period, the pay of the officers was always allowed to be in arrear; in order that the public might have a check upon them in respect of such regimental expenses and disbursements, as it was their duty to pay. From 1798 the regimental paymaster was appointed by the government, and was required to render a pay list.

Between 1783 and 1798 the following, according to the course of office was the mode of dealing with the army agent. He received monthly the money "borne upon the establishment," that is the sum voted by parliament in the army estimates for any particular regiment; and he opened three accounts. In the first he entered to the credit of the government all sums received from the paymaster general, and to the debit of the government, all disbursements for the regiment. In the second, which was a debtor and creditor account with the regimental paymaster, he entered, on the debtor side all sums paid to the regimental paymaster, and on the creditor side, all disbursements made by the regimental paymaster. The third was an account with each officer, in the regiment separately; in which he entered to the credit of the officer every sum due to the officer, whether *for [*275] subsistence, or pay, and to the debit of the officer, every payment made to him personally or through the medium of the regimental paymaster.

Every month the regimental paymaster rendered his account to the agent. At the end of the year, the agent rendered his account to the war office. The account so rendered was called the *annual state;* and consisted of all moneys received from the paymaster general on the one side, and, on the other, of all payments actually made to officers and men, or for other regimental expenses, together with the arrears of pay due to the officers, but which had not been issued to the agent, and therefore had not been paid to the officers.

After the war office had examined these accounts and checked them by the vouchers for actual payments, and by the army list for claims of arrears of pay to the officers, an order, called a clearing warrant, and directed to the paymaster general of the forces, was issued, which was an authority to the paymaster general to pay the agent a certain sum. If the sum received by the agent in the preceding year, on account of the regiment, was more than the sums expressed in the body of the clearing warrant, he paid the difference into the bank of England to the credit of the public. If it was less, he received the balance from the paymaster general.

(*a*) 23 G. 3, c. 50. (*b*) Section 24, 35, 36.

From this statement it is evident, that the issue of the clearing warrant was not a final settlement of the account between the army agent and the public, inasmuch as the item of arrears was only admitted by it as due, but was not actually issued to the agent, till after the clearing warrant itself was issued.

It is equally evident, that, at the time when the agent sent in his [*276] annual state, *he had not paid any arrears to officers, because up to that time the arrears had not been allowed; and as no account was rendered subsequently to the issue of the clearing warrant, there was nothing to show that the agent, after he received the arrears, had ever paid them to the officers. Accordingly, the clearing warrants have never been considered as a final settlement between an army agent and the crown, so as to exclude the attorney general from investigating his accounts; and so it was held in the *Attorney General* v. *Ross*,(a) as well as in another case of the *Attorney General* v. *Deare*. In the *Attorney General* v. *Brooksbank*,(b) arrears to officers constituted the principal item in dispute, and the defendant relied on a threefold plead; first, that the accounts were settled by the clearing warrants; secondly, that neither the secretary at war nor the attorney general had authority to call for an account; and thirdly, that, as to all arrears of pay the sums received had been placed to the account of the respective officers by the agent as their private banker. The court of exchequer overruled the plea in all its parts: and, on application being subsequently made for leave to amend, by introducing into the plea certain documents which had been obtained from the war office, the barons refused the motion, being unanimously of opinion that there was nothing in any of the documents which could be considered a settlement of the accounts either as to the officers' arrears, or as to any of the other items. The case went afterwards to the house of lords, and has not yet been finally disposed of.

Though the agent is appointed by the colonel, he is recognized in [*277] all that he does as a servant of the public. *When money is wanted for the disbursements of the regiment, it is the agent, and not the colonel, who applies to the war office; on this application the secretary at war issues an order to the paymaster of the forces, who makes the payment to the agent, and takes the agent's receipt. There is an annual settlement of the accounts between the agent and the paymaster; and the balance is paid to or received by the agent, as the case may be. In these transactions the colonel no where interferes: the agent is treated as a person immediately accountable to the war office; and his receipt is a voucher to the paymaster of the forces in the accounts between the paymaster and the public. It is true that the agent gives security to the colonel; but that is only as an assurance to the public, that the person appointed to the agency of a regiment is a man of substance: and though the colonel gives the agent a power of attorney, authorizing him to receive the sums becoming "due to the colonel, officers, and soldiers of the regiment," the moneys thus referred to as sums due to the

(a) 8 Price, 190. (b) Reported in some of its stages in 1 Y. & J. 439, and 2 Y. & J. 37.

colonel, are merely the sums which the colonel becomes entitled to receive as one of the officers, and not the aggregate amount which is wanted for the disbursements of the regiment.

The agent, therefore, is the medium between the regiment and the public for the transaction of the pecuniary business relating to the regiment; the moneys, which he receives from the paymaster of the forces, are paid to him in order to be applied to specific purposes; and if they are not so applied, they may at any time be called back by the crown. Can there be a more audacious proposition than this, that, if accidental circumstances prevent the moneys from being applied *de facto* to the purposes for which they were put into the agent's hands, they thereby became the agent's own? When an officer *dies abroad, it may easily happen that a sum may be issued as pay to him for weeks and months after the actual time of his death. Could the agent pretend to retain the amount of such an over issue? A Captain Pollard died at sea in June, 1795; Ridge, the agent for the regiment, when he made up his annual account, claimed and received arrears of pay for Captain Pollard up to the 24th of December, 1795. In the year 1822, in consequence of an application made by Pollard's widow to the war office, the fact of the over payment to Ridge was discovered; and Ridge was ordered to pay to the widow the arrears due to Pollard at the time of his death, and to pay into the Bank of England the sums which had been issued for arrears of pay from June to the 24th of December. [*278]

Even if the moneys issued by the master were considered as received by the colonel, and by him handed over to the agent, the crown, by virtue of its prerogative, would have a right to make that agent responsible. *The King* v. *Boon*.(a) The crown is entitled to know what has become of moneys imprested into the hands of any person for public purposes, and to recall them, if they have not been actually paid away. Supposing that the crown stood merely in the same situation as a private individual, there is not such a privity between the crown, the officer, and the army agent, as will make a payment to the agent a payment to the officer, independently of such special communications touching the payment as may take place between them. *Williams* v. *Everett*,(b) *Scott* v. *Porcher*.(c) At the period when the transactions now in question occurred, the officers could not know when the arrears would be issued: all that they knew was, that, when the arrears were issued by *the war office, the agent was the person who would receive them, and that he was directed to pay them to the officers. In 1798, the system of arrears was abolished: and, now, if officers choose to leave their pay in the hands of the agent, when they know it has been issued, it is reasonable, in the event of his bankruptcy, that they should bear the loss. This difference between the practice of the offices at the present time, and the [*279]

(a) Parker, 16. (b) 14 East, 582. (c) 3 Mer. 652.

practice as it existed prior to 1798, affords an answer to the argument, which was attempted to be founded on the letter from the war office.

There is not the slightest evidence that the officers dealt with Brummell as their private banker. The accounts are wholly regimental accounts; they were kept for the information of the agent himself, to enable him to check the regimental paymaster, and make up his own annual statement for the war office. The moneys issued for subsistence and arrears of pay were entered to the credit of the several officers, because it was more convenient to have in the ledger a separate page for each officer, than to mix up these sums in the same account with other items of disbursement. The officer drew on the agent, because he had no other means of getting the money: and the drafts would, of course, be placed to his debit. The accounts did not become banking accounts, because they were thus stated in Brummell's books: and there is not a particle of proof, that the agent had any authority from the officers to give to their accounts with him the character of banking accounts with him as their private banker.

Mr. *Pepys*, in reply.

[*280] *October*.—*The Lord Chancellor:—It appears that Messrs. Bishop & Brummell carried on the business of army agents in partnership till the death of Bishop; and that it was afterwards carried on by Brummell alone, under the same firm, till the year 1794, when he died. A considerable sum of money, amounting in the whole to 2238*l.*, which was received by the house, in the interval between the years 1783 and 1794, on account of the subsistence and arrears of the officers, and other allowances, has remained in the hands of Messrs. Bishop & Brummell, or of Mr. Brummell, without any demand having been made of any part of it, either by the officers, on account of whose pay and other claims it was received, or by any of their representatives. Under these circumstances, it is contended by the plaintiffs, that the crown is not entitled to claim the repayment of this money out of the estate of Mr. Brummell; but that the money is due to the individual officers on whose account it was received, or to their personal representatives, and that they alone can demand it.

It appears that the agents are appointed by the colonels of the respective regiments, by power of attorney; the substance of the instrument is set out in the master's report:—when so appointed, the agent is adopted by the crown; the public money is paid into his hands for defraying the expenses of the regiment, and he accounts to the government for the sums so received. It is impossible to read the evidence and the provisions of the act 23 Geo. 3, c. 50, and to resist the conclusion, that, whatever he may be in relation to the colonel, he acts in this business as the agent also of the crown. In this character, Messrs. Bishop & Brummell, or Mr. Brummell, received the money [*281] in question; *it was advanced to defray certain expenses; it has not been so applied; and, after so long an interval, there is no prospect

that it will ever be required for the objects for which it was originally issued. The purpose of the advance having thus failed, there seems to be no reason nor justice in the claim set up, on the part of the plaintiffs, to retain this money.

Some argument was built upon the manner in which the accounts of Messrs. Bishop & Brummell were kept; but it does not appear to me, that the accounts made any change in their situation with respect to these sums. The money advanced by the crown was carried in the accounts to the credit of the respective officers, and they were debited with the payments which they received. It does not appear that there was any private arrangement between the parties. When the money was received by the agent, it was received for the purpose of being paid to the officers in discharge of their claims, and the entry in the books amounts only to an admission of that which, without such an entry, would not have been open to dispute. While the money remained in the hands of the agent, he would be liable to the claims of the officers, or their representatives; but such liability will, I think, under the circumstances of the case, terminate, when the money is repaid to the crown. It appears to me, therefore, that there is no ground for sustaining this appeal; and the petition must therefore be dismissed.

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*Cook v. Bolton. [*282]

1828; November 7.

Where great delay has occurred in the prosecution of a decree for the administration of assets, a creditor may apply to have the conduct of the cause, though it has become abated by the death of a defendant.

This was a creditor's suit; the usual decree had been made; and there having been great delay in the prosecution of the decree, another creditor had, on the ground of the delay, obtained an order giving him the conduct of the cause.

Mr. *Rose* and Mr. *Davis* now moved to discharge that order as irregular, because, at the time it was obtained, the suit had become abated by the death of a defendant. The order, they contended, would be clearly a nullity as to the representatives of the deceased defendant, whenever they should be brought before the court; and being a nullity as to one party, it must be irregular as to all. If the creditor conceived that there was improper delay, he might have filed a bill of his own.

Mr. *Sugden*, contra:—There are many cases in which orders may be made in a suit which is abated. *Roundell* v. *Currer*.(a) The application of the creditor was not so much a proceeding in the cause, as an application

(a) 6 Ves. 250.

to authorize him to take proceedings in the cause. If the present motion were to succeed, negligence in the prosecution of a suit would be its own defence. During the continuance of a culpable delay, an abatement would probably happen; and then this abatement was to exclude the interposition of any more active creditor.

THE LORD CHANCELLOR refused the motion.[1]

[*283] *JEUDWINE *v.* AGATE.

1828; November 10.

A plaintiff, who sues as creditor, will not be deprived of the conduct of the suit, because the master has reported that he is not a creditor, if exceptions to that finding of the report are pending, and there is no reason to suppose that the exceptions will not be prosecuted actively.

THE plaintiffs had filed their bill as creditors to whom jointly a debt was due; a decree had been pronounced; and the master had made his report, finding that the plaintiffs were not creditors. To that report the plaintiffs had excepted.

A creditor, to whom the master had reported a debt due, and as to whose debt there was no exception, now moved to have the conduct of the suit, on two grounds; first, culpable delay in the prosecution of the suit; and, secondly, that, according to the master's report, the plaintiffs had no interest in the estate which was to be administered.

The imputation of delay was not made out.

On the other ground, Mr. *Bickersteth* and Mr. *Koe* contended, that it could not be expected that parties, in the circumstances in which the plaintiffs were now placed, would prosecute a suit actively. It was not for their advantage to urge on the hearing of the exceptions. Credit must be given to the master's report, so far as to presume that the plaintiffs had no interest in the estate; and, therefore, the administration of it should not be left in their hands.

Mr. *Sugden*, Mr. *Garratt*, and Mr. *Knight*, contra.

THE LORD CHANCELLOR was of opinion that the circumstance of the master having reported that there was no debt due to the plaintiffs,
[*284] did not constitute a *sufficient ground for granting the application, while exceptions to the report were pending; there being, at present, no reason to suppose that the exceptions would not be prosecuted actively.

[1] If there is any unnecessary delay in the prosecution of the decree, any person coming in to claim under it may apply for leave to prosecute the same, and may file a supplemental bill if necessary. *Hallett* v. *Hallett*, 2 Paige, 22.

Ex parte Winter.

1828; November 11.

The executor of a surviving trustee appointed three executors, who in an adverse litigation procured probate of his will to be decreed to them, but afterwards refused to take out probate. They are legal personal representatives of the surviving trustee, within the meaning of 6 G. 4, c. 74: and an order will be made under that act for the transfer of stock standing in the trustee's name.

An affidavit that they refuse to take out probate of the testator's will, is not sufficient to ground an order under the act; it should state that they refuse to take the steps necessary for enabling them to transfer.

A sum of stock stood in the names of James Ellis and Charles S. Ellis, as trustees under the will of Abraham Farley. Charles S. Ellis survived James, and appointed William Ellis his executor. William Ellis died, having made one will, by which he named William Ellis, George Ellis, and John Ellis, his executors, and another will, by which John Ellis alone was appointed executor. John obtained a probate of the second will, under which he got in the whole of the assets. Ultimately, this will was declared invalid, and probate of it was recalled; and, in May, 1824, probate of the first will was decreed to William Ellis, George Ellis, and John Ellis. John appealed to the court of delegates: but the matter having been in the mean time compromised, no party appeared to support the appeal when it came on. Accordingly the delegates dismissed the appeal, and remitted the cause to the court below. The sentence, however, was never drawn up; and as there was no assets remaining unadministered, William Ellis, George Ellis, and John Ellis, severally refused to take probate of the first will. Under these circumstances, a petition had been presented under the 6 G. 4, c. 74, on which a reference was directed; and the master having made his report, [*285] another petition was presented, on which the Vice-Chancellor made an order that the report should be confirmed, and that the secretary, deputy secretary, or accountant general of the bank of England should transfer the stock to certain new trustees who had been appointed.

The bank had refused to obey this order; first, because the case did not come within the 6 Geo. 4, c. 74, s. 7; and secondly, because the order did not show on what grounds it proceeded.

The petition was now brought on before the Lord Chancellor; and the bank, though not served, appeared.

Mr. *Pepys*, for the petition:—The question is, are William Ellis, George Ellis, and John Ellis, the legal personal representatives of the surviving trustee, Charles S. Ellis; and as William Ellis, deceased, was his executor, the only question is, are they the executors of William Ellis? They are named executors; and they have accepted the office, for they have obtained a decree for probate. They are, therefore, the personal representatives of the trustee. But they refuse to take out probate; and a refusal to take probate is a refusal to transfer the stock; for, till they obtain probate, they cannot make the transfer. The parties interested in the stock have no remedy, except under the

act of parliament; for they have no means of compelling probate to be taken of William Ellis' will.

Mr. *Horne*, contra:—William Ellis, George Ellis, and John Ellis, cannot be considered the personal representatives of William Ellis deceased, [*286] till they take out probate: it is *competent to them to renounce at any time. Why do not the persons interested in this stock take out administration *de bonis non* to the survivor of the two trustees in whose name it is standing? Probate has been decreed to William Ellis, George Ellis, and John Ellis: but they do not choose to carry that decree into execution; and till they have probate, they cannot be allowed to exercise, in legal proceedings, the rights of executors. Neither is it true that they refuse to transfer the stock. They have never acquired the power to transfer the stock: the case is one of inability to transfer the stock, not of refusal to transfer it. There is not even an allegation that they refuse to transfer the stock: the statement is merely, that they refuse to take out probate of William Ellis' will.

THE LORD CHANCELLOR:—These three gentlemen are named executors in the will, and probate of the will has been decreed to them; and they have not renounced. They would have been the personal representatives of the testator without the decree; that decree is only confirmatory of their title. I think, therefore, that they are "the legal personal representatives of a trustees" within the meaning of the 6th Geo. 4, c. 74, and that the case comes within the provision of that statute. I think, however, that there ought to be an affidavit that application has been made to these executors to transfer the stock, and to take the steps necessary for that purpose, and that they have refused to take those steps.[1]

The bank having asked the costs of their appearance, their claim [*287] was resisted on the ground that it appeared *that they had improperly disobeyed the Vice-Chancellor's order.

THE LORD CHANCELLOR:—It turns out, that the statements in the affidavit, on which the order proceeded, are not sufficient. The bank, therefore, must have the costs of their appearance.

[1] Vide *Ex parte Hagger*, 1 Beav. 98.

Higgins *v.* Mills.

1828; November 13.

A party, on a special application, may obtain an order to prove *viva voce*, on a rehearing, documents which were not in evidence at the former hearing, but he must pay the costs of the application.

A petition of appeal was pending in this cause: and a motion was now made on behalf of the appellant, that he might be at liberty to prove *viva voce*, on the hearing of the appeal, an exhibit which had not been used in the court below.

The motion was supported by an affidavit of the solicitor of the appellant, stating, that he had made diligent search for the document before the hearing without being able to discover where it was, but that he had since found it.

Mr. *Barber*, in support of the motion, cited *Buckmaster* v. *Harrop*,(*a*) *Dashwood* v. *Lord Bulkeley*,(*b*) *Williamson* v. *Thomson*.(*c*) He referred likewise to a MS. case of *Walker* v. *Simonds*,(*d*) in which Mr. Roupell moved that a party might be at liberty to prove *viva voce*, on a rehearing before the Lord Chancellor, exhibits which were not proved at the hearing at the *rolls; and after discussion, the motion was granted, saving just [*288] exceptions.

Mr. *Sugden*, contra, admitted that under the circumstances the order ought to be made; but insisted, that the party making the application ought to pay the costs of it.

The Lord Chancellor made the order;[1] the appellant paying the costs of the application.(*e*)

(*a*) 13 Ves. 457, 458. (*b*) 10 Ves. 230. (*c*) 9 Price, 186.
(*d*) 4th of August, 1810. (*e*) *Williams* v. *Goodchild*, 2 Russ. 91. [92 n. 1.]

[1] A motion for leave to prove *viva voce*, upon a rehearing, exhibits which were not in evidence upon the original hearing does not require notice: and Lord Cottenham says; "on a rehearing, you may use any evidence you might have used below, not requiring new depositions; and therefore the motion does not require notice." *Herring* v. *Cloberry*, Cr. & Ph. 251. An appeal from the rolls, or the Vice-Chancellor to the Lord Chancellor, is only a rehearing. *Williams* v. *Goodchild*, 2 Russ. 91.

De Themmines *v.* De Bonneval.

1828; March 27, 31. November 17,

A sum of 3 per cent. stock having been transferred by A. into the name of himself and of three trustees, a deed was executed in England by him and them, declaring they were to hold the stock upon trust to pay the dividends to A. during his life; and, after his death, to apply them in printing and promoting the circulation of a treatise written in French and latin, which inculcated the doctrine of the absolute and inalienable supremacy of the pope in ecclesiastical matters; and the deed contained a proviso, that if any court of law or equity should declare any of the trusts to be void, the trustees should stand possessed of the stock in trust for A.'s executors or administrators: Held,

That the trusts after A.'s life interest were void, as being contrary to the policy of the law, and in the nature of a superstitious use:

That the fund was not subject to a general trust for charity, so as to be applicable to any other charitable purpose, according to the pleasure of the crown suggested under the sign manual: and

That A. was entitled to have the fund retransferred to him.

The bill stated, that the plaintiff was formerly bishop of Blois in France; that he, and thirty-six other Gallican bishops, in order to perpetuate their common tenets on certain points of the doctrines and discipline of the Roman Catholic religion and of the Gallican church, did, by their solemn act of the 6th of April, 1803, address to his holiness Pope Pius the Seventh a certain manuscript, which was afterwards printed and published, under the [*289] superintendence and at the *expense of the plaintiff and the other bishops of the Gallican church, then residing in England, first in the latin language, under the title of "Canonicæ et reverentissimæ expostulationes de variis actis ad ecclesiam Gallicanam spectantibus, &c. &c.," and shortly afterwards in the French language, under the title of "Traductions des réclamations canoniques, et tres respectueuses addressées par les evêques sous-signés à notre tres-saint Père Pius VII. par la providence divine souverain pontife, contre differens actes relatifs à l'Eglise Gallicane," &c.: that the plaintiff, being desirous of preserving and perpetuating this book in its original purity, did, while residing in England, transfer the sum of 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, into the names of himself, and the three defendants, the Marquis de Bonneval, M. de Broglie, and M. de Merinville: that, by an indenture subsequently made between the plaintiff of the one part, and the plaintiff and the three defendants of the other part, and executed in London by all parties, it was declared, that they should stand possessed of the said 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, then standing in their names, upon trust to permit the plaintiff to receive the dividends for his own use and benefit during his natural life; and, after his decease, to lay out, pay, or apply, in such manner as they should think proper, all or any part of the annual interest of the said 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, in printing or reprinting, and publishing and circulating in any part or parts of the world, either in the latin or French language, or in both as they might think proper, the book so printed and published; and upon further trust, if they, the trustees, should, at any time after

the plaintiff's decease, discover or find any university, college or society, in any part of the world, which should profess and entertain the tenets and *principles of that book, and be desirous to support the same, [*290] and would agree to establish a chair in such university, college or society, to support, maintain, and promulgate the said tenets and principles, then that it should be lawful for the trustees, if they should deem it prudent and advisable so to do, to nominate and appoint, in manner therein stated, any number of the members of the said university, college, or society, to be trustees for the intents and purposes thereinafter mentioned, and to pay over, transfer, and assign the said trust moneys unto such trustees, who were to hold the same upon trust from time to time to apply the dividends of the 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, in printing or reprinting, and publishing and circulating the book so printed and published, either in the latin or French languages, or in both of them, as they, the trustees for the time being, might think most proper for teaching and promulgating the tenets and principles of the said book, in its original purity, according to the true spirit and tenets of the Gallican church from its first foundation, and its first pontiff and his legitimate successors, down to the said solemn act of the 6th of April, 1803, addressed to his holiness Pope Pius the Seventh as aforesaid, as the same would be more fully explained in a preface which the plaintiff intended to add to the next edition of the book; and it was further declared and agreed, between the several parties, that, if, at any time thereafter, the several trusts therein mentioned, or any of them should, by any court of law or equity, be adjudged to be void or incapable of being performed or carried into effect, then the defendants, or other the trustees for the time being, or the trustees selected from the said university, college or society, if any should have been appointed, should from thenceforth stand possessed of the said sum of 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, and of such *part of the dividends arising therefrom as had [*291] not been applied in execution of the trusts therein stated, in trust for the executors and administrators of the plaintiff, and to be paid and transferred to them accordingly.

The prayer was, that, if necessary, the trusts declared by the indenture concerning the said sum of 3786*l.* 10*s.* 4d. three per cent. consolidated bank annuities, might, except as to the trust for the plaintiff during his life, be adjudged to be void, and incapable of being carried into effect; and that the defendants might be decreed to transfer the stock to him for his own absolute use.

The answer of the trustees admitted the allegations of the bill.

The object of the book or treatise, referred to in the bill, was to inculcate the belief that the pope had, in all ecclesiastical matters, a supremacy which was paramount even to the authority of the temporal sovereign, and was of so sacred a nature, that it was not competent to any sovereign to impair it, or to any pope to alienate it; and that the concordat between Pius VII. and the

French government was inconsistent with the supremacy and contrary to the fundamental princples of the church.

There were two questions in the cause: first, whether a trust created by a foreigner, domiciled in England, for the purpose of teaching and promulgating in any part of the world the doctrines contained in this book, was illegal and void; and secondly, if it was void, whether the settlor was entitled to call for a retransfer of the fund.

Mr. *Tinney*, for the plaintiff.

[*292] *Mr. *Swanston*, contra.

THE MASTER OF THE ROLLS:—I have perused the pleadings in this cause, and looked into the book to which they refer. The book is not a treatise inculcating the general doctrines of the Roman Catholic church: it is written with a different object; and that object is to show, that, according to the admitted doctrines of the Roman Catholic church, the pope has, in all ecclesiastical matters, a supremacy which he is not at liberty to alienate, or to subject to the temporal sovereign, and that Pius VII., by his concordat with the government of France, did alienate it in opposition to all the principles which that church holds most sacred. Such is the nature of the work; the circulation of which, and the promulgation of the doctrines contained in it, are the purposes for which this charity is established. It is against the policy of the country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope in ecclesiastical matters over the sovereignty of the state: and although the words of the deed are so large, that it may be argued that the purposes of the charity may be effectually carried on in other parts of the world without infringing in any manner on the policy of this kingdom, still I incline strongly to the opinion, that this charitable trust is to be deemed a superstitious use and against public policy.

But there is another difficulty. By the law of England, a gift of money to superstitious uses is not absolutely void; it is held to indicate a general purpose to devote the property to charity: and it belongs to the king to direct, in furtherance of this purpose, under his sign manual, the application [*293] of the fund to other charities *not superstitious. Now, in this deed of trust, there seems to be an attempt to escape from the operation of that rule of law, by introducing a proviso, that, if, at any time, the trusts therein mentioned, or any of them, shall be adjudged, by any court of law or equity, to be void or incapable of being carried into effect, then the trustees are to transfer the trust funds to the executors or administrators of the grantor: and the question is, whether this clause is valid? The settled principle of the law of the country being, that money given to superstitious uses belongs to the king, to be applied under his sign manual to other charitable purposes not superstitious,—can any man so frame his grant and introduce into it such a proviso as shall defeat that rule of law? I give no opinion upon the point: but I must hear the attorney general upon it; and the cause

cannot proceed, till the pleadings are amended by making the attorney general a party.

The cause stood over, with leave to amend, by adding the attorney general as a party.

The attorney general being made a defendant, the cause came on again.

Nov. 17.—Mr. *Tinney* and Mr. *J. Russell*, for the plaintiff.

The trust, to which the dividends of this stock are to be applied after the death of the settlor, has for its object the promulgation of certain tenets of the Roman Catholic religion, which are in their nature superstitious, and at variance with the public policy of this country. It is, therefore, void. *The King* v. *Lady Portington*.(*a*) *De Costa* v. *De Pas*.(*b*) *De* [*294] *Garcin* v. *Lawson*.(*c*) *Smart* v. *Prujean*.(*d*) In *Abbott* v. *Cary*,(*e*) a bequest for the purpose of bringing up poor children in the Roman Catholic faith was held to be unlawful; and it was clearly the opinion of Lord Manners, in the *Attorney General* v. *Power*,(*g*) that, according to the law of England, a bequest for the benefit of such poor children as should be educated in a Roman Catholic school was void.

It is immaterial that the purposes of the charity might be carried into effect in foreign countries not under the dominion of England. In *De Garcin* v. *Lawson*, some of the bequests were to foreign nunneries, and yet were held to be contrary to the policy of this country. In *Smart* v. *Prujean*, a legacy to such purposes as the prior of a convent, or his successor, might judge most convenient, was considered by Lord Eldon to be a superstitious use, though the convent was situate in Flanders. In the present case, the trust is created in England by persons resident here, and affects property existing here: and being intended for a purpose which the law deems to be in the nature of a superstitious use, it must, according to these authorities, have failed, even if it had been established to promote the circulation of this treatise, not generally in any part of the world, but only in specific countries, as, for instance, in France or Spain.

The only remaining question is, whether, the charitable trust being unlawful, the settlor is entitled to have the stock retransferred to him? The rule of law unquestionably is, that a fund given absolutely to a charitable *purpose which is illegal, does not revert to the grantor or his repre- [*295] sentatives, but must be applied to such lawful charity as the crown, by sign manual, shall direct. The court presumes, that there existed in the mind of the donor a general intention to devote the property to charity; and it will not permit that general intention to fail, because the particular mode selected by him is unlawful. Lord Eldon(*h*) says, "that the doctrine proceeds upon this principle; that the testator's intention of charity was the

(*a*) 1 Salk. 182. (*b*) Amb. 228. 7 Ves. 76. (*c*) 4 Ves. 433, in the note.
(*d*) 6 Ves. 567. (*e*) 7 Ves. 490. (*g*) 1 Ball & Beat. 145. (*h*) 7 Ves. 77.

principal intention; that he meant, at all events, some charity; that his unlawful purpose was a mode of disappointing it; and the mode, therefore, was out of the question; and the intention should be carried into effect by another mode." But it is plain, before any case can be brought within the scope of this rule, the court must be satisfied that the donor "meant, at all events, some charity." In the present case, it is impossible to arrive at such an inference; because the donor has expressly declared, that if the fund cannot be applied to the specific charitable purpose, which he has selected, it shall not go to any other charity, but shall revert to himself. This proviso is not an evasion of the rule of law, for the case was never brought within the rule; the presumption, on which alone the rule could be held applicable, is excluded by the plain words of the deed.

Mr. *Swanston*, for the trustees:—This is not a charity for the propagation of the Roman Catholic religion, or for the support of monastic establishments, the very object of whose existence is the extension of the dominion of the Roman Catholic faith. It seeks merely to promote the circu-
[*296] lation of a *controversial treatise on points which are matters of dispute among the Roman Catholics themselves, and, therefore, cannot be considered as any essential or distinguishing part of their creed. Not only is this a purpose which is as capable of being carried into execution in foreign countries, as in England: the intention clearly was to establish a foreign charity; for the book is not in English, but in Latin and French. It has never been held that a gift to promote the Roman Catholic religion in a Roman Catholic country is illegal; much less is there any authority for saying, that it is against the law of England to promote the circulation in foreign countries of a controversial tract on disputed points of Roman Catholic church discipline.

If, however, the law will not permit the particular charitable purpose, contemplated by the deed, to be carried into effect, the money must revert to the donor. There are many cases in which the owner of property may dispose of it absolutely, with a condition, that in a certain event the disposition shall be void. The prerogative of the crown to devote to lawful charitable purposes a fund given to an illegal charity, rests on grounds which do not apply to a gift like this.(*a*)

Mr. *Wray*, for the crown:—The plaintiff has transferred the sum of stock for a special charitable purpose: the trust of this charity is completely raised; and it is not competent to him to annul it. The special purpose cannot be carried into execution, because it is contrary to the policy of the law; but the same law, which opposes the specific intent expressed in the deed,
[*297] declares that the property shall be *appropriated to some charity, and entrusts the specific mode of its application to the discretion of the crown. The donor has attempted, by means of a special proviso, to defeat

(*a*) Wilmot's Opinions, 32, 33.

an incident which the law has annexed to an absolute gift in favor of a particular charitable purpose: he has given the property, without qualification or restriction, to a specific charity, and yet seeks to reserve to himself a benefit repugnant to the legal effect of the prior gift. A court of justice will not give effect to a proviso of this kind. *King* v. *Burchell.*(*a*)

THE MASTER OF THE ROLLS:—I continue to be of opinion, that the charitable trust, declared of this sum of stock, is void, as being contrary to the policy of the law.

The policy of the court will not permit the execution of a superstitious use; but the court avails itself of the general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates that general intention by devoting the fund to some other charitable purpose. Here there is no general intention to give to charity; and the court, at the same time that it declares that the particular purpose, for which the donor has destined the property, is a superstitious use which it will not execute, is obliged to state that the gift is altogether conditional. This is a gift to a particular purpose, provided the purpose be lawful; if not, the property is to revert to the donor. On this principle, it seems clear, that the condition will prevail; and, as the particular purpose fails by reason of its illegality, the party is restored to his original rights.[1]

*It is said the condition is unlawful. I do not think so. A con- [*298] dition is not unlawful, which looks forward to the possibility of a court deciding that the gift is unlawful. If the condition were in itself illegal, the whole deed would be void. Here the unlawful gift will not prevail; but the condition will prevail. As the gift was a gift upon condition, the court has no right to interfere on behalf of the crown.

Under these circumstances, the plaintiff is entitled to have the stock retransferred to him; but he must pay the costs of the suit.(*b*)

(*a*) Ambler, 379.

(*b*) The first section of the 2 & 3 W. 4, c. 115, (which passed on the 15th of August, 1832,) after reciting that "doubts had been entertained whether it be lawful for his majesty's subjects professing the Roman Catholic religion in Scotland to acquire and hold in real estate the property necessary for religious worship, education, and charitable purposes, and that it is expedient to remove all doubts respecting the right of his majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property necessary for religious worship, education, and charitable purposes," enacts, "That his majesty's subjects professing the Roman Catholic religion, in respect of their schools, places for religious worship, education, and charitable purposes in Great Britain, and the property held therewith, and the persons employed in and about the same, shall in respect thereof be subject to the same laws as the protestant dissenters are subject to in England in respect of their schools and charitable purposes, and not further or otherwise."

[1] Vide *Bradshaw* v. *Tasker*, 2 Myl. & K. 221. *The Attorney General* v. *Todd*, 1 Keen, 803.

[*299] *WIGSELL *v.* SMITH.

1827; May. 1828; November 27.

A settlement, after limiting two estates to A. for life, remainder to his first and other sons in strict settlement, remainder to M. for life, with remainder over, required each person when in possession to assume the name and arms of the settlor; gave to the tenants for life powers of leasing and of charging the estates with a jointure of 400*l.* a year, and a sum of 2000*l.* for younger children; and reserved to the settlor a power of revocation and new appointment as to one of the estates. The settlor subsequently exercised that power by revoking, as to one of the estates, the remainder to M. for life, and the limitations over; and by appointing that estate to S. for life, with remainders over; and by the deed of revocation and new appointment, he imposed upon each of them, A. and S., when entitled as tenants for life in possession, "under the limitations aforesaid," the condition of assuming his name and arms, and gave them the power of charging the estate with a jointure of 400*l.* and with 3000*l.* for younger children, but directed that there never should be more than the yearly sum of 400*l.* a year payable out of any part of the premises as a jointure at one time:

Held, that the second deed did not give A., when tenant for life in possession, the power of appointing a second sum of 400*l.* as a jointure to his wife.

BY a deed dated in November, 1797, Thomas Wigsell and Susannah Wigsell settled the Wigsell estate, and the St. John estate, after some prior limitations, to the use of Atwood Wigsell Taylor for life; remainder to his first and other sons, in tail male; remainder to his daughters as tenants in common in tail, with cross remainder between them; with remainder to Mercer for life; remainder to his first and other sons in tail male, &c. Any person becoming entitled to these estates "under the limitations aforesaid" was required, within six months afterwards, to "assume the name and arms of Wigsell;" and the several tenants for life were empowered to grant leases, and to charge the estate with a jointure for any wife, not exceeding 400*l.* a year, and with portions for younger children to the extent of 2000*l.* A power of revocation and new appointment as to the Wigsell estate was reserved to the two settlors and the survivor.

Susannah Wigsell was the survivor of the two settlors. By a deed executed in November, 1805, in pursuance of her power, after revoking the uses, trusts, powers, conditions, and limitations, subsequent to the limita-
[*300] tions to the daughters of Atwood Wigsell Taylor, she *appointed the Wigsell estate, after failure of issue of the body of Atwood Wigsell Taylor, to the use of R. J. Streatfield for life; remainder to his first and other sons in tail, with remainders over; with powers to Atwood Wigsell Taylor and R. J. Streatfield, when entitled, as tenants for life in possession "under the limitations aforesaid," to grant leases and to charge the estate with any annual sum not exceeding 400*l.* by way of jointure to any wife, so that there was never more than one such jointure payable at one time out of any part of the said premises, and also with any sum not exceeding 3000*l.* for the portions of younger children. The clause as to assuming the name and arms of Wigsell was repeated; and Atwood Wigsell Taylor was expressly named in it, as well as Streatfield.

By indenture dated the 1st of November, 1816, Atwood Wigsell Taylor, in

execution of the power reserved to him by the indenture of the 7th of November, 1797, and of all other powers enabling him in that behalf, charged the estates, which were subject to the power, with a jointure of 400*l.* a year to his wife, Juliana, in bar of dower, to commence on his decease. By another indenture, of the 7th of November, 1816, reciting the settlement of November, 1797, and the deed of the 13th of November, 1805, he, in exercise of the power reserved to him by the latter deed, but without prejudice to the appointment made by the deed of the 1st of November, 1816, charged the estates over which it extended with a further jointure of 400*l.* a year in bar of dower, and to commence on his decease. Each of these indentures, in order to secure the jointure appointed by it, limited the estates which it purported to charge to trustees for a term of years.

Atwood Wigsell Taylor died on the 15th day of July, 1821, leaving his widow *enceinte* of a son, who was born *soon afterwards, [*301] and was tenant in tail of the estates charged with the jointure.

The bill was filed by the widow and her trustees, praying a declaration, that, according to the true construction of the indentures of 1797, and of the 13th of November, 1805, Atwood Wigsell Taylor was empowered to charge the estates with two several rent charges of 400*l.* by way of jointure, and that the widow was entitled to the two rent charges limited to her by the deeds of the 1st and the 7th days of November, 1816.

The question in the cause was, whether Atwood Wigsell Taylor had, under the two deeds, a double power of jointuring so as to be enabled to charge the estates with two sums of 400*l.* a year; or whether his power was limited to the creation of one jointure of 400*l.*?

The deeds of 1797 and 1805, on which the question arose, are stated in the report of the case before the Vice-Chancellor;(*a*) and the most material clauses are referred to in the judgment of the Lord Chancellor.

The decree of the Vice-Chancellor declared that the plaintiff was entitled only to the rent charge of 400*l.* a year, secured to her by the indenture of the 1st of November, 1816.

The widow appealed.

Mr. *Preston*, for the appellant:—The decree of the Vice-Chancellor cannot be sustained, unless the powers of jointuring created by the *deeds of 1797 and 1805 be one identical power: if the unity and [*302] identity of those powers be not established, there must be error in the decree. In enforcing payment of the jointure out of the Wigsell estate, the widow, if the proceedings were at law, would plead only the deed of 1805 and the appointment under it as constituting her title to a rent charge out of those lands: in a like proceeding to enforce payment out of the St. John estate, she would rely only on the deed of 1797. Suppose that Atwood Wigsell had left no issue at his death, so that the St. John estate had devolved

(*a*) 1 Sim. & Stu. 321.

to Mercer, and the Wigsell estate to Streatfield, the widow would have claimed her rent charge against the former by virtue solely of the deed of 1797, and against the latter by virtue solely of the deed of 1805. In the one case, the title would have been complete under the deed of 1797. The widow would not have required to introduce the deed of 1805 for the purpose of supporting her claim, and Mercer could not have used it to resist her: in the other case, she would have succeeded against Streatfield by the strength of the deed of 1805; and there is no mode of pleading by which Streatfield could have set up, as a defence, the exercise of the power reserved by the indenture of 1797. The powers, therefore, were originally distinct: the second power was no revocation of the first power as to the Wigsell estates; and such revocation cannot be implied. *Arundel and Philpot's case*,(a) *Sir Thomas Gresham's case*,(b) *Freke* v. *Barrington*.(c)

Mr. *Shadwell* and Mr. *Bickersteth*, contra:—The only object of the deed of 1805 was to substitute the Streatfields for the Mercers in the ulti-
[*303] mate limitation *of the Wigsell property, and to annex to the newly created estates the same powers and conditions as had been annexed to the estates previously existing. In expressing in the second deed those powers and conditions, there was no occasion to do more than to annex them to the new estates; for the persons, who took under the first settlement, remained subject to all its provisos. The conveyancer, however, has fallen into an inaccuracy, by introducing the name of Atwood Wigsell Taylor in those clauses which were intended to annex to the estates limited to the Streatfields the same modifications which had affected the estates limited to the Mercers; and out of this inaccuracy the claim of the plaintiff arises.

The question is, did Susannah Wigsell intend, by the instrument of 1805, to give Atwood Wigsell Taylor a double power of jointuring? After the substitution of the new estates to the Streatfields, she proceeds to require that Atwood Wigsell Taylor and his children, and also the Streatfields, shall, within six months after coming respectively into possession, take the arms and name of Wigsell. Atwood Wigsell Taylor and his children were already subjected to this obligation by the prior deed. As to them the clause was nugatory: it is impossible that she could have meant to have created a second condition of this nature; the only object must have been to express her purpose, that the conditions imposed by the deed of 1797 should remain unaltered. In like manner Atwood Wigsell Taylor and his children are mentioned in the power of leasing: they already had that power annexed to their several estates; and a second accumulative power of leasing is an useless absurdity. In like manner the powers of sale and exchange are repeated. Thus it is manifest that in the clauses of the second settlement the name of Atwood Wigsell Taylor is introduced, not for the purpose of adding

(a) Cited in 3 Chan. Cas. 70. (b) Leonard, 89. (c) 3 Bro. C. C. 274.

accumulative *powers and conditions, but merely in order, unneces- [*304]
sarily, to express the intention of the settlor, that the powers and conditions annexed to the estate by the deed of 1797 were to continue in force. Such being clearly the case, with respect to all the powers, except that of jointuring, the same construction must, according to all fair reasoning, be applied to the power of jointuring. If any doubt could be entertained as to the intention, it would be removed by the clause in each deed, which declares, in the plainest terms, that there never shall be at one time more than one jointure of 400*l.* payable out of the premises. How can there be a power of appointing two rent charges of 400*l.* each, if there is never to be more than one jointure of 400*l.* subsisting at a time?

Even, according to the literal construction of the deed, the conditions and powers are utterly void and inoperative, so far as regards Atwood Wigsell Taylor. They are to have effect only when he comes into possession of the property, under the limitations aforesaid, that is, under the limitations of the deed of 1805. But he never could come into possession "under the limitations aforesaid;" for he took nothing by that deed,—the Streatfields alone took estates under it. Thus the supposed power of appointing a second jointure is to arise only when an estate comes into possession, which can never come into existence.

Mr. *Preston*, in reply:—"Under the limitations aforesaid" is nothing more than "under the limitations before mentioned:" the limitations created by the deed of 1797 are mentioned by way of recital in the previous part of the deed of 1805; and, therefore, they may, with perfect propriety of *diction, be included under that phrase as well as the limitations [*305]
which are created by the operative part of the latter deed.

The limitation to Atwood Wigsell Taylor is as much a limitation mentioned in the deed of 1807, as the limitation to Streatfield. That the one is mentioned in the recitals, and the other in the operative part of the deed, is a circumstance of no importance. So far as estates are created by the second settlement, the powers contained in it are annexed to them; so far as estates are not created by it, the powers which it gives are annexed to estates created by the first settlement, but mentioned in the second settlement. No other construction can be adopted without doing great violence to the words of the deed and the intention of the settlors. For instance, it cannot be denied that Atwood Wigsell Taylor had, and was meant to have, a power of charging 3000*l.* as portions for younger children; for the power is expressly given to him by the second deed. But unless he acquired this power under the second deed, as a person who might be in possession "under the limitations aforesaid," he could not have it at all; for, under the settlement of 1797, the power of charging portions was limited to 2000*l.* According to the argument of the respondents, Atwood Wigsell Taylor never could have charged the estates with more than 2000*l.* for younger children. If they say that he might have made a charge of 3000*l.* for portions, they admit that the powers contained

in the deed of 1805, are annexed not only to the estates created by it but also to the estates created by the deed of 1797.

The clause as to portions shows that it was the intention of the settlor in the deed to confer new powers; and this is further corroborated by the [*306] power of *appointing new trustees, which is not in the first settlement, but is in the second, and by the powers of sale and exchange given to those new trustees. The estate of Atwood Wigsell Taylor was, in this respect, modified and altered by the deed of 1805; for, according to the indenture of 1797, his life estate, and the powers annexed to it, could not be affected by new trustees, or any sale or exchange, or other act of theirs. It is therefore impossible to predicate identity of the powers which the two deeds purport to annex to the life estate of Atwood Wigsell Taylor. The intention was to revoke, as to the Wigsell property, the old powers, and to substitute others.

It is said, that there is never to be more than one jointure affecting any part of the lands at the same time. But if Streatfield were to come into possession of the Wigsell estate, and Mercer into possession of the St. John estate, Streatfield would have a right to charge the former lands with a jointure for his wife, and Mercer would have a like right to make an equal charge on the latter property in favor of his wife.

The question, however, does not depend on what may be conjectured to have been the intention of the parties. Even if it were admitted that the intention was, that there should be only one jointure of 400*l.* and that a mistake had been made in the frame of the deeds, the mistake could not be rectified. The true point is, could the powers under the one deed and the powers under the other deed be blended at law as identical? In other words, after the execution of the deed of 1805, could a title have been shown against Streatfield to a jointure out of the Wigsell estate, merely under the deed of 1797, and without reference to the deed of 1805?

[*307] *Nov. 27.—The Lord Chancellor:—The question in this case arises upon instruments affecting two estates distinguished by the names of the St. John estate and the Wigsell estate. By deeds executed in 1797, they were settled to the use of Thomas Wigsell for life; with remainder to his first and other sons in tail; with remainder to Susannah Wigsell; remainder to trustees for a term of 500 years; with remainder to the daughters of Thomas Wigsell as tenants in common in tail general, with cross remainders between them; with remainder to Atwood Wigsell Taylor for life; remainder to his first and other sons in tail male; remainder to his daughters as tenants in common in tail general, with cross remainders over; remainder over to a person of the name of Mercer for life, with remainder to his first and other sons. In this settlement there was a power to any tenant for life in possession to charge all or any part of the estates with a jointure to the amount of 400*l.* a year in favor of any woman with whom he might intermarry, and

also with portions for younger children to the extent of 2000*l.* It contained likewise the usual powers of leasing and of sale and exchange; and it imposed a condition that any person becoming entitled to the estates under the limitations aforesaid should, within six months afterwards, assume the name and arms of Wigsell. A power was given to Thomas Wigsell and Susannah Wigsell jointly, or to the survivor of them, to revoke these uses, limitations, and powers, with the exception of the term for 500 years, and the estates tail of the daughters of Thomas Wigsell, and to appoint any new uses; but Susannah Wigsell covenanted that, after the death of Thomas Wigsell, she would not exercise this power, except for the purpose of sale, partition, or exchange.

*The power of revocation and new appointment was not executed [*308] jointly by Thomas Wigsell and Susannah Wigsell; but in September, 1805, Thomas Wigsell died; and, in the following November, Susannah Wigsell, in exercise of her power of revocation, revoked all the limitations, uses, and powers affecting the Wigsell estate, subsequent to the limitation in favor of the daughters of Thomas Wigsell; and by the same deed she limited the Wigsell estate, after failure of issue of Atwood Wigsell Taylor, to a person of the name of Streatfield for life, with remainder to his first and other sons,—so that the family of Streatfield was substituted for the family of Mercer. She then provided that Atwood Wigsell Taylor and his family, and R. T. Streatfield and his family, when they should come into possession of the estate under the limitations aforesaid, should within six months take the name and arms of Wigsell; and she directed that, if they did not do so, "the estates hereinbefore limited to them should cease and be void."

One question arises as to the meaning of the words "coming into possession under the limitations aforesaid," and "the estates hereinbefore limited to them." On reading the deed of November, 1805, the first impression undoubtedly is, that those terms must refer to the estates limited by this settlement; that "the limitations aforesaid" are here the limitations contained in and made by this settlement; and that "the estates hereinbefore limited" are the estates limited by this settlement. But Atwood Wigsell Taylor did not take any estate under the settlement; the insertion, therefore, of his name along with that of Streatfield appears to have arisen from a mistake; and the whole of this clause, so far as it relates to Atwood Wigsell Taylor, would be inoperative. That such is the correct construction of the term "aforesaid" is fortified by this *circumstance, that the phrases "es- [*309] tates hereinbefore limited," and "limitations aforesaid," apply to R. T. Streatfield: but R. T. Streatfield took nothing under the other settlement; he took only under the settlement of November, 1805; and therefore the words must be held to denote the estates created by this deed, and not those which are contained in the former settlement. It is also remarkable that, in adverting to a former part of the settlement, we find a different phrase

is made use of; for there the reference is not to the estates "hereinbefore limited," but to "the estates hereinbefore mentioned."

The same observations will apply to the next proviso, by which a leasing power is given. Atwood Wigsell Taylor is named in it: but, so far as relates to him, the clause, according to the construction which I have referred to, is inoperative. Next comes the proviso, "that it should be lawful for each of them the said Atwood Wigsell Taylor and R. T. Streatfield, when entitled as tenants for life in possession to the said manors, hereditaments, and premises, under the limitations aforesaid, either before or after his intermarriage, from time to time by any deed, &c., to appoint to any woman or women with whom he should intermarry, for her jointure, any annual sum or sums of money not exceeding in the whole the yearly sum of 400*l.*, to be issuing out of all or any part of the aforesaid premises, with powers for recovering the same, &c.; so that there never be more than the said yearly sum of 400*l.* payable out of the said premises as a jointure at any one time." The observations which I have made on the preceding clauses are equally applicable to this. Atwood Wigsell Taylor never was, and never could be, in pos-
[*310] session under any of "the limitations *aforesaid;" and therefore no new power of jointuring was given to him by the clause in question.

But let us suppose that, by a little force on the construction, the phrases, "under the limitations aforesaid," and "the estates hereinbefore limited," are to be considered as embracing all the limitations contained in the indentures recited in the deed of November, 1805: what will be the result? The clause then amounts to nothing more than this, "provided that when Atwood Wigsell Taylor shall come into the possession of this property under the former settlement, he shall have the power of charging the estates with 400*l.* a year as a jointure to his wife." Even construing it in that way, it does not give any additional power; it is a mere repetition of the power contained in the former deed. By the former deed Atwood Wigsell Taylor had a power of charging the estates with 400*l.* a year as a jointure to his wife; and here it is again mentioned that, when he should come into possession of the lands, under the limitations of that deed, he is to have the power of charging them with 400*l.* a year as a jointure to his wife. It is a mere repetition—an useless repetition, I admit, where the power given by the former deed still subsisted—but, at all events, a mere repetition.

If there is nothing in the literal construction of the terms to vary the notion that the deed of 1805 gave no additional power, is there any thing in the intention of the parties, as manifested in the deed, which ought to lead us to suppose that the power, which it professes to give to Atwood Wigsell Taylor, was to be an accumulative power? The intention appears to me to be the other way; and there is nothing on the face of the instrument
[*311] *to show any intention of giving a second jointure. For, in the first place, it appears that Atwood Wigsell Taylor and R. T. Streatfield were meant to be put on the same footing except with respect to priority.

Atwood Wigsell Taylor was to take before R. T. Streatfield, but they were each to take the same kind of estate. Streatfield has only the power of charging 400*l.* a year as a jointure; and there is no reason, therefore, to suppose that Atwood Wigsell Taylor was meant to have the power of charging the property with two sums of 400*l.* by way of jointure. It is also expressly provided that the estate shall be charged with only one jointure at the same time.

It is material to consider that from the very nature of the two former provisos—the one relating to the change of name and taking the arms of Wigsell, and the other giving the leasing power,—neither of them could be accumulative; and the natural conclusion is, that the power of jointuring was not meant to be accumulative.

As to the power of charging portions, even supposing the second construction of the terms, "the limitations aforesaid," were to be adopted, so that the second power would extend to Atwood Wigsell Taylor, it would give him only a power of charging the estate with 1000*l.* more for provisions than he could do under the settlement of 1757.

On the whole, as the terms of the deed, according to the strict and literal natural construction, do not confer a second power of charging the estate with a second sum of 400*l.*, and as there is nothing in the instrument leading me to suppose that such was the intention of the party, I am of opinion that the appeal must be dismissed, and the decree of the Vice-Chancellor affirmed.

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*Cremorne *v.* Antrobus. [*312]

1828; December.

Construction of a will as to what will pass under the description of "furniture."

A testator by his will bequeathed his leasehold dwelling house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also, all and singular the fixtures appurtenant to his said leasehold messuages, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith: by a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:" Held, that pictures placed in the house as ornamental furniture, and the plate and linen, passed by the codicil; but that the codicil had no operation on the disposition made by the will of the books, the gold and silver coins, trinkets, and things of that nature.

Thomas Lord Viscount Cremorne by his will, dated the 26th of December, 1811, devised his freehold manors, lands, and hereditaments in the counties of Louth, Waterford, and Monaghan, to trustees and their heirs, upon

trust, for Richard Thomas Dawson during his life, and after his decease, for his first and other sons successively in tail male, with remainders over. Then followed a bequest in the following words:—"Next, I give and bequeath unto my said dear wife all that my leasehold messuage and dwelling-house, with the outhouses, buildings, grounds, and appurtenances thereunto belonging, situate in Stanhope street, May Fair, in the county of Middlesex, and in my own occupation, which I now hold on lease for a long term of years, and of which there is now about nine hundred years to come and unexpired, and which said messuage, tenement, and premises is subject to a yearly ground rent of 31*l.* payable in respect thereof; to have and to hold the said leasehold messuage or tenement and premises, with the appurtenances, for all such estate, term, or interest as I shall have therein at the time of my decease, unto my said wife for and during the term of her natural life, together with all the pictures, prints, drawings, or paintings in miniature or enamel, except
[*313] the picture of my dearest Lady Ann Dawson, with all my *gold and silver coins, medals, watches, and trinkets of every kind whatsoever, as also my coaches, carriages, harness, and furniture to the same belonging; as also all and singular the fixtures appurtenant to my said last mentioned messuages, together with the household furniture, plate, linen, wines, liquors, and other my estate and effects whatsoever in and about the same, and that shall be in my possession at the time of my decease, or in and about my said dwelling house, or the outhouses and offices appurtenant thereto and by me held, used, occupied, and enjoyed therewith, and as appurtenant thereto, also given to my said wife, and the coach-houses and stables which I now occupy, for all the estate and interest I have therein, for her life, she paying the rent and performing the covenants contained in the lease under and by virtue of which I hold the same; and after the death of my said dear wife, I give all the aforesaid leasehold premises situate in Stanhope street aforesaid, so as aforesaid devised to her for her life, to hold the said leasehold messuage and premises for all the term I have therein, unto the said Richard Thomas Dawson, his executors, administrators, and assigns, for his and their own use and benefit, together with all the aforesaid pictures, drawings, coins, medals, trinkets, coaches, carriages, and furniture to the same, together with all the aforesaid furniture, plate, liquors, and every other article and thing whatsoever mentioned and included in the aforesaid devise, as shall be found to be in and within my said messuage, dwelling-house, and other premises so as aforesaid devised to her for her life, at the time of her decease, for his own use and benefit, and subject to the rents and covenants aforesaid."

The testator afterwards made a codicil, dated the 13th of March, 1812, which contained the following clause:—"And as to my leasehold
[*314] messuage or *dwelling house in Stanhope street, wherein I now dwell, I do declare my will and desire to be, that my said dear wife shall and may have and enjoy the same, with all the furniture and appurtenances thereunto belonging, during the term of her life, and from and after her de-

cease that the same messuage or dwelling house, with such furniture as shall be in, about, or belonging thereto at the time of such her decease, shall go unto and be held and enjoyed by the said Richard Thomas Dawson, or such other person or persons as by virtue of the limitations in my said will contained shall, for the time being, be entitled to the bulk of my freehold estates, it being my desire and intention that my said leasehold house shall be held and enjoyed after the decease of my said wife, together with my said freehold estates, so far as the nature of the property and the rules of law will permit; and I do hereby, so far as I have any power or authority in that respect, give and bequeath the said leasehold messuage or tenement and premises accordingly, for all the residue of the term or estate now to come and unexpired therein; provided always, and I do expressly declare my will to be, that no person who shall or may, under or by virtue of the limitations of the settlement of my said will directed to be made of my said freehold estates, be entitled to an estate tail in the same freehold premises shall be entitled to take or be considered as having taken an absolute interest in the said leasehold premises, or any part thereof, until such person shall have attained the age of twenty-one years, or shall sooner depart this life, leaving lawful issue living at his or her death, or born in due time afterwards, which shall first happen."

The testator died in March, 1813, and his widow on the 14th of April, 1826. Richard Thomas Dawson Lord Cremorne died in March, 1827, when his son Richard *Lord Cremorne became tenant in tail [*315] in possession of the testator's freehold estates; and a question arose between him and the personal representative of his father as to the extent to which the codicil had revoked the disposition made by the will of the furniture and other articles in and about the leasehold in Stanhope street. The present Lord Cremorne, as tenant in tail in possession of the freehold estates, insisted that the operation of the codicil extended to all the various articles which were given to the widow of the testator during her life, so that upon her decease Richard Thomas Lord Cremorne became entitled to the use of them, but only for his own life, and that upon his death they went to the person next in remainder. On the other hand, the personal representative of Richard Thomas Lord Cremorne contended that the disposition directed by the codicil after the death of the widow did not extend to all the articles included in the bequest contained in the will, and, therefore, that, upon the death of the widow, Richard Thomas Lord Cremorne, under the clause in the will, was entitled absolutely to all those articles which the words of the codicil did not comprehend.

The articles in the dwelling house in Stanhope street were set forth in the schedule to the master's report. The first part of the schedule contained fixtures and household goods; the second part, linen and china, which had been in ordinary use; the third part, books, kept in book-cases or shelves fixed to the walls, and prints, and pictures which had been framed and were usually

hanging up; and the fourth, portfolios of plates, books of prints, medals, coins, miniatures, trinkets, and a variety of miscellaneous articles. The master was of opinion that the articles comprised in the first three parts
[*316] of the schedule were to be considered as furniture. *Lord Cremorne presented a petition, praying that the report might be confirmed, and those articles might be assigned to a trustee in trust for him and the other persons successively entitled to the testator's freehold estates. The personal representative of Richard Thomas, late Lord Cremorne, presented a counter petition, insisting that the articles comprised in the second and third parts of the schedule belonged to him absolutely, and praying that they, together with the articles enumerated in the fourth part of the schedule, might be delivered to him.

On these petitions, the Master of the Rolls made an order bearing date the 5th of June, 1828, which declared, that, according to the true construction of the codicil, all the articles and things by the will specifically given with and belonging to the leasehold house in Stanhope street, were, subject to the life interest therein of the testator's widow, given, together with the said leasehold house, to the person for the time being entitled by virtue of the limitations in the will to the bulk of the testator's freehold estates, to be held and enjoyed together with those estates, so far as the nature of the property and the rules of law would permit; and directions were given for assigning the leasehold and all the articles comprised in the four parts of the schedule to a trustee upon trusts conformable to the tenor of the declaration.

From this order the personal representative of Richard Thomas Lord Cremorne appealed.

He contended that the words in the codicil comprised only what in the strict sense of the word was denominated furniture, namely, the articles enumerated in the first part of the schedule; and, therefore, the codicil did not, as to the articles enumerated in the second, third, and fourth parts of the schedule, alter the bequests contained in the will.

[*317] *Mr. *Bickersteth* and Mr. *Lynch*, for the appellant.

Mr. *Sugden*, Mr. *Pepys*, and Sir *George Gray*, for Lord Cremorne.

Mr. *Knight*, for an infant entitled in remainder.

1829; *January*.—The Lord Chancellor:—Nothing can be more precise or particular than the enumeration of the property which the testator intended should pass by the bequest in the will. He intended not only that the furniture, properly so called, should pass, but every article of personal property which should be in the house at the time of his decease. After the death of his wife, he gives this property absolutely to Richard Thomas Dawson, and, in so doing, again enumerates the property almost in the same terms as he had used before: and though in the second enumeration some particu-

lar articles or some particular terms are omitted, they are supplied by general expressions at the end of the clause, by which the bequest of the property over was made co-extensive, (as far as related to the description of the property,) with the original bequest to the widow. No doubt can be entertained with respect to the construction of the will.

Three or four months afterwards the testator made a codicil, the object of which was, that after the death of the wife, the leasehold house and the furniture in or about it, or belonging to it, should, as far as the rules of law would allow, go with the bulk of his freehold estates. It is material to advert to the terms of the bequest contained in the codicil. The testator, in describing the property in the codicil, does not make use of the same *expressions as he had previously made use of in the will; but em- [*318] ploys terms of a more general description: and it is upon the meaning and import of those terms, taken, not merely by themselves, but in connection with and in reference to the will, that the present question has arisen. The words of the codicil are these:—"I do declare my will and desire to be that my said dear wife shall and may have and enjoy the same," (that is, the dwelling house in Stanhope street,) "with all the furniture and appurtenances thereunto belonging, during the term of her life; and from and after her decease, that the same messuage or dwelling house, with such furniture as shall be in, about, or belonging thereto at the time of such her decease, shall go unto and be held and enjoyed by the said Richard Thomas Dawson, or such other person or persons as by virtue of the limitations in my will contained shall for the time being be entitled to the bulk of my freehold estates; it being my desire and intention that my said leasehold house shall be held and enjoyed, after the decease of my said wife, together with my freehold estates, so far as the nature of the property and the rules of law will permit." The question is, whether all the articles which by the will were bequeathed together with the leasehold house, or only a part of them, are to be comprehended in the codicil?

Some stress was laid, in the course of the argument, upon the words "and appurtenances thereunto belonging:" and it was said that the effect of the word "furniture" was extended by the words "appurtenances thereunto belonging." It appears to me that there is no weight in that argument; because, upon adverting to the will, I find precisely the same expressions made use of, not with reference to the furniture or the articles in the dwelling house, but with reference to the messuage itself. In the will, he bequeaths his *leasehold messuage, "together with the outhouses, [*319] buildings, ground, and appurtenances thereto belonging,"—precisely the same phrase as occurs in the codicil: and, in grammatical construction, the words "appurtenances thereto belonging" in the codicil may be referred to the messuage as clearly and as satisfactorily as in the will itself. He gives the messuage to his wife for life, "with the furniture and appurtenances thereto belonging;" that is, the furniture belonging to the dwelling house,

and the appurtenances belonging to the dwelling house. The codicil must be taken, therefore, as if the words "and appurtenances thereunto belonging" were omitted, and as if the clause were, "my will is, my wife shall have and enjoy my leasehold house with all the furniture thereunto belonging." The question then is, what is the meaning of those terms?

If the construction had depended upon the codicil alone, the words, I think, would have embraced the pictures, because, by the finding of the master, the pictures were part of the ornamental furniture of the house;—they would have embraced the plate, because the plate was in use in the family;—they would have embraced the linen, because that was part of the furniture of the house. It was said that the terms of the codicil ought to be controled and governed by the terms of the will, and that it was clear, from the disposition in the will, that the testator did not mean to include under the description of furniture either the pictures, the plate, or the linen. In the will, the testator gives the dwelling house, together "with all the pictures, prints, drawings, or paintings in miniature or enamel, except the picture of my dearest Lady Ann Dawson, with all my gold and silver coins, medals, watches and trinkets of every kind whatsoever; as also my coaches, carriages, harness, and [*320] furniture to the *same belonging; as also all and singular the fixtures appurtenant to my said last mentioned messuage, together with the household furniture, plate, linen, wines, liquors, and other my estate and effects whatsoever in and about the same." And it was contended that it was clear from this special enumeration, that the testator did not consider that these different articles were included under the term "furniture." Now this argument resolves into two parts. When the testator gives his household furniture, plate, linen, wines, liquors, &c., it cannot be argued, with any show of reason, that, because he specially enumerates plate and linen, &c., he did not consider they passed under the word "furniture," the words of enumeration following the term "household furniture;" and though the testator might understand and suppose that the articles would pass under the description of household furniture, it was natural that for greater certainty he should enumerate them specifically. I think, therefore, the argument has no force as applicable to the plate, the linen, and the other articles which immediately follow the term "household furniture."

The construction might be different with respect to the pictures, prints, &c., because he gives the pictures, &c. first, together with the household furniture, and seems, therefore, to draw a distinction between them and household furniture. Still, when I consider that three or four months elapse after the date of the will before the codicil was executed, and when I find that in the codicil he gives the house together with all the furniture thereunto belonging, and that the pictures formed a part of the furniture, whatever doubt the expressions in the will may throw upon the subject, I think that doubt is not sufficiently strong to lead me to say that those articles did not pass by the codicil under the description of "all the furniture belonging to the

dwelling house." I am of *opinion, therefore, (concurring so far [*321] with the Master of the Rolls,) that the pictures, the plate, and the linen, passed by the codicil.

There are, however, two other classes of articles to which I must direct my attention. I imagine it is unnecessary for me to say any thing with respect to the coaches and carriages. Lord Cremorne died in the year 1813, and the tenant for life, in the year 1826; therefore the coaches and carriages must be out of the question; they must have been worn out during the life of the tenant for life. As to the gold and silver coins, trinkets, and things of that nature, they would not pass under the description of "furniture belonging to the dwelling house," unless there are special circumstances showing that those articles were so used and disposed of in the house, as to be part of the ornamental furniture of the house, or in some way connected with it. I may conjecture that the testator intended that all the property should pass by the bequest in the codicil, which was affected by the bequest in the will; but I cannot act on that conjecture; and I do not see in the codicil any words sufficiently strong to authorize me to say (unless there are some special circumstances,) that the gold and silver coins, the medals, watches, trinkets, and other articles of that kind, passed by the codicil.

Neither do I think that the books will pass under the description of "furniture," unless there be special circumstances.[1]

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*Sturz *v.* De La Rue and others. [*322]

1828; December 24.

An invention for giving paper, by the application of a certain composition, such a surface as renders the lines of copper and other plate printing more clear and distinct, may properly be described in a patent as an improvement in copper and other plate printing.

One of the ingredients in the composition was a white substance, imported from Germany, and which could be purchased at one or two color shops in London; the only description or denomination given to it in the specification was, "the purest and finest chemical white lead;" but there was no article known by that denomination in the trade, or in the shops where white lead is usually sold; and the finest white lead which could be obtained would not answer the purpose: Held, that the specification was insufficient.

On an application for an injunction to restrain the infringement of a patent the party must swear, that at the time of making the application, he believes that at the date of the patent the invention was new, or had not been previously known or used in this kingdom.

An injunction had been obtained *ex parte* to restrain the defendants "from making, printing, engraving, preparing, selling, or disposing of, or causing to

[1] Plate, in the use of the family, is embraced by the words "household goods and furniture." *Bunn* v. *Winthrop*, 1 Johns. Ch. Rep. 338. In *Kelly* v. *Powlet*, Amb. 605, the Master of the Rolls said: "the word 'household furniture' has as general a meaning as possible. It is incapable of a definition. It is capable only of a description. It comprises every thing that contributes to the use or convenience of the house-holder or ornament of the house." See also *Cole* v. *Fitzgerald*, 1 Sim.

be made, printed, engraved, prepared, sold, or disposed of, any printings, engravings, cards, boards, or tablets, or other articles made, printed, engraved, or prepared according to the invention therein mentioned, or any part thereof, or otherwise, in infringement of a certain patent," to which the plaintiff claimed to be entitled by assignment from John George Christ, the original patentee.

The patent purported to be "for certain improvements in copper and other plate printing." The specification declared that "the nature of the invention consisted in putting a glazed or enamelled surface on paper to be used for copper and other plate printing, by means of *white lead* and size, whereby the finer lines of the engraving are better exhibited than heretofore, and also in a mode of polishing the said enamel, and the impression after it has been drawn from the plate." Directions were given for preparing the size, and for mixing with it a certain proportion of "the *finest and purest chemical white lead*, previously ground fine;" and then the mode of applying
[*323] the mixture to the surface of *the paper was described, together with the process to be observed in applying the plate to paper thus prepared, and in drawing off the impression. It was added, that the press-board should "be made of a plate of cast iron, ground to a perfectly smooth surface; that the paper, with the impression so drawn off, should be laid aside for twenty-four hours, and at the end of that time, placed with the impression downwards, on a plate of finely polished steel, and passed several times through the press with a strong pressure." The specification claimed, "as the said invention, the glazing and enamel hereinbefore described, applied to paper or card board in manner also hereinbefore described, for the purpose of copper and other plate printing."

The defendant now moved to dissolve the injunction, on the ground that the alleged patent was void.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Loraine*, in support of the motion.

Mr. *Tinney* and Mr. *Rotch*, contra. The first objection made to the patent was, that the title did not agree with the specification, or describe the alleged invention truly. The patent, acording to the title, was for improvements in copper and other plate printing; the alleged invention related merely to the manufacture of a certain species of paper or cards. It was on a similar ground that patents were held to be void in *Cochrane* v. *Smethurst*,(*a*) and *The King* v. *Wheeler*.(*b*) Supposing, for a moment, the patent to be valid, could it be denied, that every person had a right to prepare cards and paper in the very mode described in the specification, provided he did
[*324] not use *such cards and paper for the purpose of plate engraving?

The answer made by the plaintiff was, that plate printing was a

& Stu. 189, and n. 1. ibid. S. C. 3 Russ. 301. 10 Sim. 192, n. (*a*.) Under a bequest of household furniture, fixtures belonging to the testator in a leasehold house, occupied by him, will pass. *Paton* v. *Sheppard*, 10 Sim. 186.

(*a*) 1 Stark. 205. (*b*) 2 B. & A. 350.

process, and that the invention claimed by the patentee was an improvement in one or more of the stages of that process. In *The King* v. *Wheeler* the process was misdescribed; the improvement was not what the patent stated it to be, "in drying and preparing malt," but in the making of beer by means of a new mode of using malt; and the patent (supposing there had been no other objection to it than the title,) would have been valid, if it had been expressed to be, "for improvements in the making of beer." In *Cochrane* v. *Smethurst*, the alleged invention did not form part of a process, and the patent should have been for an improvement in lamps or in the burners of lamps.

THE LORD CHANCELLOR:—The description in the patent must unquestionably give some idea, and, so far as it goes, a true idea of the alleged invention, though the specification may be brought in aid to explain it. The title in this patent is for "certain improvements in copper and other plate printing." Copper plate printing consists of processes involving a great variety of circumstances: the paper must be of a particular description; before it is used, it must be damped; it must remain damp a certain time, and must be placed in a certain temperature; the plate must be duly prepared, and duly applied, and various processes must be gone through, before the impression is drawn off and brought to a finished state. An improvement in any one of those circumstances,—in the preparation of the paper, for instance, or the damping of it, &c.—may truly be called *an improvement in copper plate printing*. In this case, the principal part of the improvement *relates to the preparation of the paper. It is material to the perfec- [*325] tion of copper plate printing that the lines should be as distinct as possible; and if, by adding any thing to the surface of the paper, more clearness is given to the lines, that is an improvement in copper plate printing. Here, however, the improvement extends to other steps of the process, as well as to the preparation of the paper. For the specification, though it says that the impression is to be taken off in the usual manner, states, that an iron board is to be substituted for a wooden one, and describes a subsequent operation through which the impression is to go.

The second objection was, that the substance, which was to be mixed with the size, was not properly described or denominated in the specification.

The affidavits filed on the part of the defendants stated, that application had been made at the shops of the principal chemists in London for the purest or the finest chemical white lead, but that none of these chemists knew of or had any such article; that the purest and the finest white lead would not answer the purpose; that, for several years before the date of the patent, the defendant De La Rue had made many experiments for improving the surface of paper and cards by applying mixtures of white lead and size, all of which failed; that, since he had read the specification, he had repeated the experi-

ments, observing the directions there given, but with as little success as before; that no preparation of lead known in this country would produce the surface which appeared on the plaintiff's cards; that, some time ago, the defendant De La Rue, when travelling on the continent, met with a white substance, which, on trial, furnished the enamel which he had long [*326] sought *for, and, when mixed with size and duly applied, gave to paper a beautiful white surface; that he had since discovered that this white substance was imported by the plaintiff, and was used by him for putting the last coats of composition on his paper and cards, the previous coats being made of white lead or some other inferior article; that the defendant De La Rue had subjected portions of the said white substance to various trials, from which he was satisfied that it was not the substance known in this country as white lead, though he believed it to be a preparation of lead in combination with other substances; and that he was confirmed in his opinion by the fact, that the white coloring matter imported from abroad, when dissolved, changed litmus blue test paper red, whereas no such effect is produced by pure white lead.

The plaintiff swore in reply, that the substance used by him in the composition for glazing and enamelling paper and cards was the finest and purest chemical white lead; that he procured it from Germany; that it was imported by other persons in this country, particularly by Mr. Ackerman in the Strand, and by his son, Mr. Ackerman in Regent street; that it could be bought of them, on application for "the finest and purest chemical white lead," which was its proper name, and the only proper name by which it could be denominated in the English language; and that it consisted of white lead fined and purified, by chemical process, to the highest possible degree of which its nature was capable.

It appeared, further, that the substance in question had been bought by one person at the shop of Mr. Ackerman in Regent street, under the name [*327] of "the purest and finest chemical white lead." On the other *hand, a person swore that having gone to the two shops of the Messrs. Ackerman, and inquired for the purest chemical white lead, he was informed by the shopman at the one shop, "that he did not know such a color;" and at the other, "that they did not keep it."

The Lord Chancellor:—It is a principle of patent law, that there must be the utmost good faith in the specification. It must describe the invention in such a way, that a person of ordinary skill in the trade shall be able to carry on the process. Here the specification says, that there is to be added to the size certain proportions "of the finest and purest chemical white lead." A workman would likely go to a chemist's shop, and ask for "the finest and purest chemical white lead;" the answer which he would receive would be, that there was no substance known in the trade by that name. He would be compelled to ask for the purest and finest white lead; and, accord-

ing to the evidence, the purest and finest white lead that can be procured in London will not answer the purpose.

It is said that there is a substance prepared on the continent, which is white lead, or some preparation of white lead; and that, by using it in the manner described in the specification, the desired effect is produced. If that be so, the patentee ought to have directed the attention of the public to that circumstance. He ought to have said, "The purest white lead which can be obtained in the shops in London will not do; but there is a purer white lead prepared on the continent, and imported into this country, which alone must be used." "The purest and finest chemical white lead" must mean the finest and purest white lead usually gotten in the general market for that *commodity, unless the public be put on their guard by a [*328] statement, that what would be called very fine and pure white lead, in the ordinary sense of the trade, will not answer, but that the white lead used must be of a superlatively pure and fine quality, prepared in a particular way and to be gotten only in a particular place. If the article is not made in this country, but may be imported, it would be necessary to mention that circumstance.

It is said that the description in the specification will be sufficient, if the substance is known in the trade by the name of "the purest and finest white lead," or "the purest and finest chemical white lead." But it does not appear that there is any substance generally known in the trade by that denomination.

It is alleged that the substance can be purchased at the shops in London; and two are specified. In point of fact, it has been purchased only at one of those shops; and they are not chemists' shops, but color shops.

It appears to me that this specification does not give that degree of full and precise information which the public has a right to require. In this state of the evidence, therefore, the injunction cannot be sustained.

Mr. *Sugden* urged that the injunction ought to be dissolved with costs; more especially because the plaintiff had not stated in the affidavits on which he obtained it, nor alleged in his bill, that, to the best of his knowledge and belief, at the time when he applied for the injunction, the invention mentioned in the patent was new, or newly introduced into this country; and he relied upon Lord Eldon's *dictum* in *Hill* v. *Thompson*,(a)—

*"When in future an injunction is applied for *ex parte*, on the ground [*329] of violation of a right to an invention secured by patent, it must be understood that it is incumbent on the party making the application to swear, at the time of making it, as to his belief that he is the original inventor; for although when he obtained his patent, he might have very honestly sworn as to his belief of such being the fact, yet circumstances may have subse-

(a) 3 Mer. 624.

quently intervened, or information have been communicated, sufficient to convince him that it was not his own original invention, and that he was under a mistake when he made his previous application."

The affidavit of the plaintiff stated, that by certain letters patent the patentee, Christ, was authorized to exercise and make use of within England, &c. "a certain invention in the said letters patent recited to have been, *as it had in fact been, as deponent verily believes*, communicated to the said John George Christ by a certain foreigner residing abroad." There was not in the bill, or in the affidavits on which the injunction was obtained, any other allegation as to the originality of the invention, or as to its not having been previously known or used in this country.

THE LORD CHANCELLOR:—There can be no doubt that, when a party comes for an injunction against the infringement of a patent, he ought to state that he believes, at the time when he makes the application, that the invention was new, or had never been practiced in this kingdom at the date of the patent. It is not enough that it was believed to be new at the time when the patent was taken out.

The injunction was dissolved with costs.[1]

[*330] *BAILEY *v.* LLOYD.

1829; February 5.

In 1779, S. L., in contemplation of his marriage with A. V., covenanted for the payment of 3000*l.* within three months after his decease, for the benefit of the children of the marriage; in 1815, upon the marriage of Emma, one of his daughters by A. V., he executed a deed, which recited that it had been agreed, that by way of additional portion for Emma, he should enter into a covenant, that she should have an equal share at least with his other children, of the real and personal estate which he should be entitled to at his decease, after payment of his debts; and that any money or other estate and effects which any of the children might receive in the lifetime of S. L., or might become entitled to under or by virtue of any gift or disposition by will or otherwise, made or to be made by A. V., the mother, or otherwise howsoever under her, should be deemed an advancement within the meaning of the indenture. This recital was followed by a covenant, that his heirs, &c. should within three months after his death convey to the trustees of Emma's settlement a share of his real and personal estate, equal to the share which any other of his children should have had or be entitled to; and afterwards came a proviso, that any money and other estate and effects which might afterwards be conveyed or advanced by S. L. to any of his children, and also that certain copyholds, of which A. V. was tenant in tail, whose interest, it was stated, was forthwith intended to be barred, and further, that any money, or other estate and effects, which any of the children might receive by the gift, bequest, or other disposition by will otherwise of A. V. or under the statute of distributions in case of her intestacy, or which any of them should derive by, from, or under her by any ways or means, should be deemed an advancement within the meaning of the covenant. No act was done to bar the estate tail of A. V. in the copyholds, and, on her death and the death of S. L., the eldest son and customary heir became entitled to the copyholds under the limitations in

[1] As to the frame of a bill for the violation of a patent, see *Kay* v. *Marshall*, 1 Myl. & Cr. 373. *Westhead* v. *Keene*, 1 Beav. 287.

1828.—Bailey v Lloyd.

the surrender, which created the estate tail: Held, that these copyholds were to be considered as an advancement to the eldest son, within the meaning of the covenant.

That the 3000*l.* due under the covenant of 1779 was to be paid, before any part of the assets could be applied in satisfying the covenant contained in the deed of 1815.

Whether a testator intended by his will to execute a power, is to be collected from the whole instrument, and not from the force of any particular expression.

In this case, the testator devised his estates, and made disposition of part of the fund to be produced, by the sale of the estates, to purposes not warranted by the power; but still, upon the whole will, the court held that he intended to execute the power.

The recital of a deed is a key to the construction where the operative part is doubtfully expressed and not otherwise.

By articles of agreement, bearing date the 12th of April, 1779, Samuel Andrew Lloyd, in consideration of an intended marriage between him and Ann Vokins, the daughter of Richard Vokins and Margaret his wife, covenanted with trustees, that, in case he should survive *his intend- [*331] ed wife, and should at his death leave issue by her which should survive him for three months, his heirs, executors, or administrators, should within three months after his decease, pay 3000*l.*, to be divided among all or any of the children or issue of the marriage, in such shares as he, Samuel Andrew Lloyd, should by deed or will appoint, and in default of appointment, among the children of the marriage in equal shares.

The marriage was solemnized. Afterwards, on the 2d of March, 1780, Richard Vokins, for and in consideration of the natural love and affection which he had for his only child, Ann Lloyd, and her husband, Samuel Andrew Lloyd, and the issue between them begotten or to be begotten, and for divers other good causes and considerations, surrendered certain copyhold lands holden of the manor of Thornbury, to the use, after the death of himself and his wife, of Ann Lloyd during her life, and then of Samuel Andrew Lloyd during his life, and afterwards of the heirs of the body of Ann by Samuel Andrew Lloyd begotten or to be begotten.

By deeds dated the 9th and 10th of May, 1780, Richard Vokins and Margaret his wife conveyed certain freehold estates to trustees and their heirs, to the use, after the death of Richard and Margaret Vokins and of Mr. and Mrs. Lloyd, of all or any of the children of Mr. and Mrs. Loyd, in such shares as they should, during their joint lives, jointly appoint; and if no joint appointment was made, to the use of all and every or any and such of the children or child and issue of the body of the said Ann Lloyd by the said Samuel Andrew Lloyd begotten or to be begotten, as well female as male, and without distinction, either entire, or by such parts, shares, and proportions, or disproportions, at such times or time, for such estates, intents, and purposes, and *in such manner and form as the survivor or longest liver of the [*332] said Samuel Andrew Lloyd and Ann his wife, by any deed or deeds in writing, with or without power of revocation, under his or her hand and seal, by him or her executed, in the presence of and attested by two or more credible witnesses, or by his or her last will and testament in writing, or any writing in the nature thereof, or purporting so to be, under his or her hand

and seal or hand alone, to be by her executed or signed in the presence of and attested or witnessed by three or more credible witnesses, should appoint.

In 1815, Mr. Yokins and his wife had been long dead. Mr. and Mrs. Lloyd had had nine children, of whom seven were at that time alive; and Emma, one of the daughters, being about to intermarry with the plaintiff Arthur Bailey, Mr. and Mrs. Lloyd by a deed dated the 26th of October, 1815, appointed to her one-seventh share of the freehold and leasehold premises comprised in the settlement of the 10th of May, 1780; and Mr. Lloyd, by the same deed, appointed to her one-seventh share of the 3000*l.* The share thus appointed was, along with other property, made the subject of a settlement dated the 28th of October, 1815, in which was the following recital:—"And whereas the said S. A. Lloyd is and stands seised of or well entitled to freehold estates of inheritance of considerable value; and it was also agreed by and on the part of S. A. Lloyd, on the treaty for the said marriage, that, by way of additional portion for his said daughter Emma Lloyd, he should enter into a covenant that she Emma Lloyd should have and be entitled to an equal share at least with his present or future children of the estates real and personal which he the said S. A. Lloyd should be seised of or entitled to at the time of his decease, after due payment of his just debts, funeral and testamentary expenses; and that if any or either of his children [*333] *shall at any time or times hereafter have or receive any sum or sums of money, or other estate or effects, upon marriage or otherwise, in the way of advancement, in the lifetime of the said S. A. Lloyd, he, she, or they should account for and accept the same as and in part of his or her share of the estates real and personal of their said father; and also that any and every sum and sums of money, and other estate and effects real and personal, which the said children or any of them should become and be entitled to, under or by virtue of any gift or disposition by her last will and testament, or otherwise made or to be made by the said Ann Lloyd, the mother, or otherwise howsoever under her, shall be deemed and considered an advancement within the true intent and meaning of these presents." In the operative part of the deed the covenant was expressed in these words:—"And this indenture further witnesseth, that, in further consideration of the said intended marriage, and in further pursuance of the agreement made upon the treaty for the same, the said S. A. Lloyd for himself, his heirs, executors and administrators doth covenant, promise and agree with and to the said F. Bailey and H. Lloyd, their executors, administrators, and assigns, in manner following, viz., that in case the said intended marriage shall take effect, then and in such case the heirs, executors, and administrators of him the said S. A. Lloyd shall, on or before the expiration of three calendar months after his decease, duly convey, assign, and assure such part of the real and personal estate of or to which he shall be seised, possessed, or entitled, as shall be equal at least to the shares which the other children of him the said S. A. Lloyd, or any or

either of them, shall have or be entitled to, or shall have had or been entitled to, of or in such estate or effects, unto and to the use of them the said F. Bailey and H. Lloyd, or the survivor or survivors of them, his heirs, executors, *administrators and assigns, to the intent that they or he may [*334] stand seised or possessed thereof and interested therein, upon and for the several trusts, intents and purposes, and with, and under, and subject to the several powers, provisos and agreements hereinbefore declared and contained concerning the same, or such of them as shall then be subsisting and capable of taking effect: Provided always, and it is hereby agreed between and by the said parties to these presents, that all and every sum and sums of money, or other estate and effects whatsoever, which shall or may at any time hereafter be conveyed, assigned, or advanced and paid by him the said S. A. Lloyd unto or for the benefit of his said children, or any of them, exceeding in amount or value the sum of 50*l.* each, shall be deemed and considered as part of the portion or share, portions or shares of the child or children to whom or for whose benefit the same shall have been conveyed, assigned, advanced, or paid as aforesaid, and be brought into hotchpot and accounted for accordingly; and for obviating all doubts as to such advancement, it is hereby expressly declared, that as well the seven parts or shares hereby appointed of and in the said freehold and leasehold estates, and money comprised in the said indentures and articles, and other undivided parts and shares thereof, as also certain copyhold lands and premises within the manor of Thornbury, in the county of Gloucester, which, in contemplation of the marriage of the said S. A. Lloyd, and Ann his now wife, were surrendered by R. Vokins and Margaret his wife, her father and mother, to certain uses under which she the said Ann Lloyd is now tenant in tail, and which interest is intended to be forthwith barred, shall be deemed advancements within the meaning of this settlement: provided also, and it is hereby further agreed, that all and every sum and sums of money, or other estates and effects, which the said children or any of them *shall have received or been entitled to, or [*335] shall receive or be entitled to by the gift, devise, bequest or other disposition, either by last will and testament or otherwise, of their said mother Ann Lloyd, or under the statute of distributions in case of her intestacy, or which they or any of them shall derive by, from, or under her by any other ways or means, shall also for the purposes of this settlement be deemed and considered as an advancement or advancements within the true intent and meaning of the proviso or covenant last hereinbefore mentioned."

The marriage was solemnized. Afterwards, Julia Ann and Elizabeth, two other daughters of Mr. and Mrs. Lloyd, married.

In 1819, Mrs. Bailey died, leaving only one child, a daughter. Mrs. Lloyd had died in the preceding year. No act had been done to bar the estate tail, which she took in the copyholds under the surrender of the 2d of March, 1780; and, therefore, upon her death, Henry Lloyd, her eldest son

and customary heir, became entitled to these copyholds, subject to his father's life estate.

On the 18th of January, 1822, S. A. Lloyd made his will, which was duly executed and attested in the presence of three witnesses, and was in the following words:—"I, S. A. Lloyd, of Newbury, county of Berks, Esq., do hereby revoke all wills and other testamentary dispositions by me heretofore made, and do declare this to be my last will. First, I desire that all my just debts, funeral and testamentary expenses be paid. By virtue of all and every power and powers, authority and authorities enabling me thereto, I give and devise all and singular my messuages, lands, tenements, and hereditaments, and real estates whatsoever and wheresoever [*336] *to my two sons, Henry Lloyd and Edmund Lloyd, their heirs, executors, administrators, and assigns, according to the respective tenures thereof, to the uses and upon the trusts hereinafter declared, viz. upon trust and with full power for them, and the survivor of them, his heirs, executors, administrators, and assigns, to sell and dispose of the whole thereof, at such times after my decease as he or they shall think fit, altogether or in lots, by public auction or private contract, as they shall think fit, for the best price that can be obtained for the same, and convey and assign the same when sold to the person or persons who shall be the purchaser or purchasers thereof, and his or their heirs, executors, and administrators and assigns, according to the respective tenures thereof, and to such uses as he, she, or they shall appoint; and in the mean time, and till such sale or sales, to receive the rents and profits thereof, and to apply the same in the same manner as the dividends, interest, and proceeds of the moneys to arise by sale thereof are directed to be applied; and for facilitating such sale, I direct that the receipts of the trustee or trustees for the time being shall be good and effectual discharges to the purchasers or purchaser of my said real estates, which shall be sold in pursuance of this my will, for so much of the money as in such receipts shall be expressed to be received, and that such purchasers shall not afterwards be answerable for any loss or misapplication of such moneys, or any part thereof. And, further, I give and bequeath to the said H. Lloyd and E. Lloyd, their executors, administrators, and assigns, all the rest and residue of my moneys, securities for moneys, stocks, goods and chattels, and personal estate and effects, upon trust that they, and the survivor of them, and their or his executors and administrators or assigns, do and shall sell and convert into money such parts thereof as shall not consist of money, or securities for mo- [*337] *ney, and do and shall stand possessed of such moneys to arise from the sale of my said real estates, and to be produced from the residue of my said personal estate in trust, to pay thereout all my just debts, funeral and testamentary expenses, then in trust to invest the residue of the money to be produced from the sale of my real estates and personal estates as aforesaid, in government securities or real securities, and from time to time to vary

such securities as occasion may require, or as they or he shall think fit, and to stand possessed of such trust moneys, stocks, and securities upon the trusts following, viz. in trust to pay to the trustees, for the time being, of my late daughter Emma's marriage settlement, such proportion or proportions thereof, as in the said settlement is or are covenanted and agreed to be paid upon the trusts therein contained; and then in trust to divide the remainder amongst themselves, my said sons H. Lloyd and E. Lloyd, and my daughters Julia Ann, now the wife of Theodore de Tremerrenc, Elizabeth, now the wife of J. E. Bicheno, and Laura Jane Lloyd equally, share and share alike: yet, nevertheless, as to the share of my daughter Julia Ann, it is my will that the said H. Lloyd and E. Lloyd, and the survivor of them, and his executors, administrators, and assigns shall stand possessed thereof, upon the trusts hereinafter declared, viz. in trust to invest the same at interest in any government stocks or funds, English or foreign, or real securities in his or their names, and to vary such securities as occasion may require, and to receive and stand possessed of the dividends and interest thereof, upon trust to pay and apply the same for the sole use of my daughter Julia Ann, separate and exclusive of the said Theodore de Tremerrenc her husband, and in such manner that the same may not be under his control or liable to his debts, and so that the receipts of her, my said daughter Julia Ann, or any person to whom she may assign them when due, may, notwithstanding her *coverture, be good and effectual discharges for the money thereby [*338] expressed to be received: yet, nevertheless, so that my said daughter Julia Ann may not anticipate or assign any part of the said dividends or interest before the same shall become due; and after the decease of my said daughter Julia Ann, in case that shall happen in the lifetime of her said husband, to stand possessed thereof in trust for such of her children as shall be then living, and the issue of them as shall be then dead, equally to be divided between them; such issue to take only such share as their respective parent would have taken if living, and the said shares to be paid to such children or issue, if males, on their attaining the age of twenty-one years, and if females, on their attaining that age, or marrying with the consent of the parent or parents if living, and if dead, then of their guardians: and in case any such children or issue shall (as to males) die under the age of twenty-one, or as to females under age, or without having been married with consent as aforesaid, then as to the original, and any surviving share of him, her, or them so dying, in trust for the survivor of them, and the executors, administrators, and assigns of such of them being dead, as shall have lived to attain a vested interest in their respective shares, and at such times and in such proportions as his, her, or their original shares shall become payable, or as soon after as circumstances will permit. And I further direct that my said trustees, for the time being, shall, after the decease of my said daughter Julia Ann, (in case that event shall take place in the lifetime of the said Theodore de Tremerrenc,) apply the dividends and interest, or part of the principal, or

the whole, if necessary, of the presumptive shares of such children or issue of the said last mentioned trust moneys, as they, my said trustee or trustees for the time being shall think fit; and in case my said daughter, Julia Ann, shall die in the lifetime of the said Theodore de Tremerrenc without leaving any child or issue living at her decease, or, leaving such, [*339] they shall die without attaining a vested interest in the trust moneys hereby intended for them, then I do bequeath the same trust moneys, stocks, and securities unto such person or persons, as, at the time of the decease of my said daughter Julia Ann, will be entitled to the same under the statute of distributions of intestates' estates in England, in case she had died intestate and unmarried. Yet it is my will, in case my said daughter Julia Ann shall survive her said husband, that the whole of the said share, directed to be retained by my said trustees upon the trusts aforesaid, shall be paid to her for her own absolute use and benefit. I also direct, that the provision, made by this my will for my children, shall be accepted by each of them in satisfaction of any benefit to which they already are, or may be entitled, under any articles or settlement made upon my marriage with my late wife Ann Lloyd, or any appointment made or to be made in pursuance thereof, by any power vested under any such articles or settlement as aforesaid, or any deed or writing which may subsist at the making of this my will. Provided always, and I do declare, that my trustees and executors hereby appointed, and each of them, and their executors, administrators, and assigns shall be chargeable only with such moneys as they shall respectively receive by virtue of the aforesaid trusts, notwithstanding their joining in any receipts for conformity, &c. &c. I appoint the said H. Lloyd and E. Lloyd my executors of this my will, and I give them, their heirs, executors, administrators and assigns, all the real and personal estates vested in me at my decease, in trust or by way of mortgage, to hold the same upon the trusts, and subject to the equity of redemption, to which such estates may at my decease be liable or subject."

Samuel Andrew Lloyd, died shortly afterwards.

[*340] *The bill was filed by Mr. Bailey, his infant daughter, and one of the trustees of his marriage settlement, for the purpose of having the rights of the parties under the different instruments ascertained.

Mr. *Pepys* and Mr. *West*, for the plaintiffs.

Mr. *Polson*, for Henry Lloyd.

Mr. *Bickersteth* and Mr. *Knight*, for Edmund Lloyd.

Mr. *Blackburne*, for Bicheno.

Sir *George Grey*, for the family of the Tremerrencs.

The first question was, whether the will of Mr. Lloyd was a good appointment of the 3000*l.* mentioned in the deed of the 12th of April, 1779, and of the freeholds and leaseholds settled by the deeds of the 10th of May, 1780. The master had found that it was a good appointment of the property; and to his report the plaintiffs excepted. They contended that the power of ap-

pointment had not been exercised, except as to the one-seventh appointed to Mrs. Bailey by the deed of the 26th of October, 1815, and that they were, therefore, entitled to a share of the remaining six-sevenths of the sum of 3000*l.* and of the freeholds, and of certain leaseholds, which had been assigned on the same trusts with the freeholds, as being a fund of which no appointment had been made.

Henry Lloyd took a similar exception to the report.

In support of the exception *Lowes* v. *Hackward*,(*a*) was cited. It was argued that it would not be held to have been the intention of the testator to exercise his power *because he devised *his* estates, and the [*341] estate in question was not his, he being only tenant for life, with a power of appointment;—because the estates devised were made a fund for the payment of his debts, and funeral and testamentary expenses, with which he had no authority to charge the estates which were subject to the power;—because he had directed the covenant into which he had entered upon his daughter Emma's marriage, which was a merely personal covenant, to be satisfied out of the produce of these estates;—and because the trusts in favor of his daughter Julia Ann and her children much exceeded the limits of the power.

On the other side *Kenworthy* v. *Bate*,(*b*) and *Trollope* v. *Linton*,(*c*) were cited.

February 5.—THE MASTER OF THE ROLLS:—A devise of *my* estates has been repeatedly held not to pass estates, over which the testator could only exercise a power;[1] but in those cases there has been nothing in the will to demonstrate that the testator did mean by *his* estates to pass estates which were not strictly his property but in a limited sense were *his* estates, being in his possession. The question here is a mere question of intention, and the intention is to be collected, not from a particular expression, but from the whole will.[2] He prefaces his devise thus:—"By virtue of all and every power and powers, authority and authorities enabling me thereto, I give and devise my estates, &c." No testator, who considered himself to be disposing only of estates strictly his own, ever used such language; and this preface manifests a plain intention to pass all estates which he could affect by virtue of any power which was vested in him.[3] I agree that he had no authority by virtue of his power to charge these estates *with his [*342] debts, funeral, and testamentary expenses, and that he had no authority to subject these estates to the satisfaction of his general personal covenant. In answer to this, it is said by the counsel who support the master's report, that the devise was of all his estates,—as well those which were his absolute

(*a*) 18 Ves. 171. (*b*) 6 Ves. 792. (*c*) 1 Sim. & Stu. 477.

[1] Vide *Morrice* v. *Langham*, 11 Sim. 274.

[2] Vide *Hunloke* v. *Gill*, 1 Russ. & M. 515, 525. *Blagge* v. *Miles*, 1 Story's Rep. 448.

[3] Vide *Hughes* v. *Turner*, 3 M. & K. 666.

property, as those in which he had a life interest and power only, and that the property strictly his own was more than sufficient to satisfy all his debts and engagements. Taking this to be so, still that part of the will must be admitted to be very inartificially drawn. With respect to the daughter Emma, however, I see no reason why he could not give her as much of the fund to which the power extended, as would satisfy the covenant in her settlement. I agree that the provisions for the daughter Julia Ann and her children much exceed the limits of the power. As to the clause which directs that the provisions made by his will should be taken in satisfaction of every benefit to which his children might be entitled under the settlement—the first observation is, that this clause proves that he had the settlement in his contemplation; and I must take the meaning of this clause to be, although awkwardly expressed, that, this being an exercise of his power under the settlement, it must be taken by the children as a satisfaction of all benefit intended for them by the settlement. There is as to the present question no difference between the estates subject to the power, and the 3000*l.* subject to the power, inasmuch as a subsequent part of the will applies generally to all personal estate. Upon the whole, I consider this will, from the ignorance or carelessness of the person who drew it, as affording conflicting evidence with respect to the testator's intention; but it does appear to me, that the weight of evidence is much in favor of the intention to execute the power, and accordingly I overrule the exception.

[*343] *The cause was heard on further directions; and the material question was, whether the copyhold estate at Thornbury, which Henry Lloyd the customary heir had succeeded to, was to be considered an advancement to him within the meaning of the covenant in the marriage settlement of Mrs. Bailey.

The master by a separate report had found that Ann, the wife of the testator, had been tenant in tail of the copyhold estate; and that, after her death, Henry Lloyd, the eldest son of the testator, and her customary heir, became and was entitled thereto under and by virtue of the surrender of the 2d of March, 1780, in the report mentioned, and that the value of it at the death of the testator was 3677*l.*, and at the date of the report, 4222*l.*

The counsel for the defendants argued that the recital manifested that it was not the intention of the parties, as to the mother's estate, that any thing should be considered an advancement within the intent of the covenant, except what came to a child by the gift or disposition of the mother, or was derived by some means under her, and that the customary heir took this copyhold not by the gift, act, or disposition of the mother, nor in any manner under her, but as tenant in tail in remainder under the surrender made by the mother's father; that although the first part of the covenant did seem in terms to extend to this copyhold, yet this was qualified by the provisions which immediately followed, and which, like the recital, referred only to the benefits

derived by any child, from the gift or disposition of the mother or under her, and that the expression used in the first part of the covenant, that the estate tail of the mother in the copyhold was intended to be forthwith barred, implied that the testator meant that these lands *should be deemed [*344] an advancement, only in case, by the entail being barred, he acquired a power of disposition over them.

THE MASTER OF THE ROLLS:—If the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties; but where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital.[1] Here, in the first part of this covenant, the testator expresses unequivocally that this copyhold, if it come to any child, shall be deemed an advancement, as he might have provided that any property descending from a mere stranger should be considered as an advancement.[2]

Another question raised was, whether Henry Lloyd was not to be put to his election, between the copyholds and the benefits given him by the will of his father.

The Master of the Rolls held, that there was no ground for putting him to his election.

The Master of the Rolls also held, that the share of Mrs. de Tremerrenc was not well appointed after her death, in case she died in her husband's lifetime.

June 22.—There was reason to believe that the assets would not be sufficient to satisfy the covenant for the payment of 3000*l.*, and also the covenant under which the trustees of Mrs. Bailey's settlement were entitled to have her share made equal to Henry's. This gave rise, on settling the minutes of the decree, to another question, whether *the two cove- [*345] nants ought to be satisfied rateably, or whether the 3000*l.*, due under the covenant in the deed of 1799, was to be paid in full, before any part of the assets could be applied in satisfaction of the covenant in Mrs. Bailey's marriage settlement.

For the defendants it was argued, that the settlement stated that the agreement of the parties was, that Mr. Lloyd should enter into a covenant that Mrs. Bailey should have a share of his real and personal estate, equal to that of the most favored child, "after payment of his just debts;" the 3000*l.* payable under the covenant of 1779, was an existing, though a contingent, debt, at the time of Mrs. Bailey's marriage, and was recognized and referred to in her marriage settlement: it therefore could not have been the intention of the

[1] Vide *Brown* v. *Meredith*, 2 Keen, 533. *Alexander* v. *Crosbie*, Lloyd & G. 151.
[2] Vide *Ansley* v. *Bainbridge*, 1 Russ. & M. 657.

parties that the covenant should, in that settlement, affect the assets, till the 3000*l.* and all the other debts of Mr. Lloyd were fully paid.

For the plaintiffs it was answered, that Mr. Lloyd had covenanted by the deed of 1815, that his assignees should, within three months after his decease, convey to the trustees of Mrs. Bailey's marriage settlement, a share of his real and personal estate, equal to the shares which any other of his children should have had or be entitled to. The language of the operative part of the instrument was unequivocal, and could not be limited by inserting, from the recital, the words "after payment of his debts." The covenant in the deed of 1815 was as absolute and unqualified as the covenant of 1799; and the claim under both covenants must be satisfied equally.

The Master of the Rolls:—I cannot infer that it was the intention of the parties to act contrary to the agreement expressed in the settle-
[*346] ment. *There is nothing in the actual covenant which is inconsistent with the recital; the recital is the key to the construction, where the operative clauses can be reconciled with it. I think, therefore, that the 3000*l.* must be paid, before any part of the assets can be applied in satisfying the covenant in the deed of 1815.

Bishop *v.* Rufford. Rufford *v.* Bishop.

1829; March 11.

Where a mortgage of land is made, by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance, that it has been partly composed of interest turned into principal by rests, and interest on that interest, according to the course of dealing between a banker and his customers.

Machinery affixed to the freehold of iron works, is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron works are let, such articles are furnished by and continue to be the property of the lessor.

An exception does not lie to a master's report, upon the ground that he has therein stated irrelevant matter.

Messrs. Rufford & Biggs, who were bankers at Stourbridge, had for some time been in the habit of accepting and endorsing bills for a partnership of iron masters, consisting of Sergeant Hornblower, William Hornblower, and Abel Josiah Smith; and there being due to Messrs. Rufford & Biggs, in respect of these dealings, a sum of money, exceeding 10,000*l.*, an indenture, bearing date the 7th of October, 1815, was executed, whereby the fee simple of certain iron works in Staffordshire, which, subject to a prior mortgage of 1000*l.*, belonged to the Hornblowers as tenants in common, was conveyed to to Messrs. Rufford & Biggs, for securing as well the sum then due to them, which was stated in the indenture to be 10,000*l.* and upwards, as all

future sums which should become due to Messrs. Rufford & Biggs from the three partners, any or either of them, by a continuance of [*347] the same course of dealing, not exceeding in the whole the sum of 20,000*l.*, including the sum of 10,000*l.*, together with all interest, discount, commission, costs, charges, and expenses, for or in respect thereof, or attending the same. The property comprised in the security was described as consisting of certain parcels of land, and the buildings, steam engines, furnaces, iron works, and other erections on them, and all other the parcels of land, messuages, warehouses, shops, steam engines, furnaces, mills, iron works, steel works, and other hereditaments of Serjeant Hornblower, W. Hornblower, and A. J. Smith, or of any or either of them, situate at or near Brierly Hill in the parish of Kingswinford. The proviso for redemption was, that if S. Hornblower, W. Hornblower, and A. J. Smith, or any or either of them, &c. should pay or cause to be paid unto Francis Rufford and Thomas Biggs, their executors, administrators, and assigns, upon demand, the sum of 10,000*l.* with interest for the same at five per cent. per annum, and also should from time to time, and at all times thereafter, regularly provide cash for and pay or cause to be paid all such bill or bills of exchange, or promissory or other note or notes, draft or drafts, which Francis Rufford and Thomas Biggs, or either of them, had already received from, accepted, indorsed, or drawn, or which they or either of them, their or either of their future partners or partner should thereafter receive from, accept, indorse, or draw for, in favor of, or at the request, by the order, or on the account of the said Serjeant Hornblower, W. Hornblower, and A. J. Smith, or any or either of them, as when and where they should severally become due and payable, and also should from time to time, and at all times thereafter, on demand, well and truly pay or cause to be paid unto Francis Rufford and Thomas Biggs, their executors, administrators, or assigns, future partners or partner, all and every such [*348] sum and sums of money as they or either of them, their or either of their future partners or partner, should at any time or times thereafter advance, pay, lay out, or expend for or on account, by the order, or at the request of the said Serjeant Hornblower, W. Hornblower, and A. J. Smith, or any or either of them, or as Francis Rufford and Thomas Biggs, their or either of their heirs, executors, administrators, or assigns, or future partners or partner, should be called upon, or liable, or compellable to pay for or by reason or on account of the acceptance or indorsement of any bill or bills of exchange, or other bills, or promissory or other note or notes, draft or drafts then already drawn or made, or to be drawn or made, by Serjeant Hornblower, W. Hornblower, and A. J. Smith, any or either of them, upon or made payable by or at the house of Francis Rufford and Thomas Biggs, &c., together with interest for all and every such respective sum and sums of money at the rate of five per cent. per annum, from the time or respective times such payments or advances should severally be made; then Rufford & Biggs

were to reconvey and reassure the property to the mortgagors, according to their several rights.

Smith retired from the partnership in June, 1816; Serjeant Hornblower died on the 21st of June, 1819; and William Hornblower became a bankrupt on the 15th of February, 1822. During the whole of this time, W. Hornblower continued in the possession and occupation of the mortgaged property.

After his bankruptcy, Messrs. Rufford & Biggs filed their bill for the purpose of having the accounts taken, and of obtaining payment of the balance due from the said partnership or the continuing traders, or either of
[*349] them, in respect of such dealings. A bill was also filed *by the assignees of Hornblower, seeking to impeach or cut down the security of Messrs. Rufford & Biggs.

By the decree made at the hearing of these causes, it was referred to the master to take an account of what was due to Messrs. Rufford & Biggs at the three several periods of the retirement of Smith, the death of Serjeant Hornblower, and the bankruptcy of William Hornblower. And the assignees of Hornblower having, under an order made in the causes, sold property which the plaintiffs claimed to be entitled to as comprised in their security, it was also referred to the master to inquire what part of that property consisted of real, and what of personal estate, and what part of such personal estate was in the order and disposition of the bankrupt William Hornblower at the time of his bankruptcy; and he was further to ascertain the produce of the sale, distinguishing such part of the personal property as he should find to have been in the order and disposition of the bankrupt at the time of the bankruptcy.

In pursuance of the decree, the master made two reports, to each of which the assignees took several exceptions.

It appeared from the master's report that, on the execution of the deed, an account with Hornblower & Co. was opened in the books of the banking house on the security of the mortgage, and was continued as an open account current down to the 15th of February, 1822. On the 7th of October, 1815, the balance due to the bank was 13,783*l.* 10*s.* 9*d.*; and that balance had been struck upon accounts in which rests had been made from time to time, and interest had been charged on the balance due for principal and interest
[*350] as ascertained at each rest. In like manner, in the accounts *subsequent to the 7th of October, 1815, as entered in the books of the bank, and in the pass books, rests were made sometimes annually, sometimes half yearly; and the sum reported by the master to be due on the security of the mortgage was the balance resulting from this mode of stating the accounts.

The exceptions of the assignees proceeded on the ground that the master ought to have rejected all rests, and ought not to have allowed interest to be charged upon interest.

Mr. *Bickersteth* and Mr. *Wakefield*, in support of the exceptions:—In the account as it has been taken, the prior interest is at each rest converted into principal, which thenceforward bears interest, and at the next rest, the interest on this interest is again converted into principal bearing interest; so that the mortgagee has the benefit of compound interest, accumulating, not merely at the end of each year, but half yearly, and sometimes quarterly. Now, the law does not permit interest to be thus charged on interest on a mortgage security. In *Lord Ossulston* v. *Lord Yarmouth*,(*a*) a proviso in the mortgage deed, that the interest, when in arrear for six months, should be accounted principal, and carry interest, was held to be void, and Lord Cowper there said, "an agreement made at the time of the mortgage will not be sufficient to make future interest principal; it is requisite that interest be first grown due, and then an agreement concerning it may make it principal." In *Brown* v. *Barkham*,(*b*) Lord Chancellor Parker says, "suppose the mortgagee signs an account whereby he owns so much money due for interest, I question whether this *will make the interest principal; because of itself it does not show any agreement or intent to alter the interest, or the nature of that part of the debt, or turn it into principal; neither does it appear to have been ever so determined. I conceive, to make interest on a mortgage principal, it is requisite there should be a writing signed by the parties, forasmuch as the estate in the land is to be charged therewith." Even in the cases which have determined that in some classes of transactions compound interest may be charged, such as *Morgan* v. *Mather*,(*c*) and *Ex parte Bevan*,(*d*) the court has carefully guarded against the extension of the doctrine to real securities. "It is clear," says Lord Eldon, "you cannot *à priori* agree to let a man have money for twelve months, settling the balance at the end of six months, and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than five per cent., agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate that you will forbear for six months upon those terms, that is legal. So this is legal between merchants, where is no agreement to lend to either, but they stipulate for mutual transactions, each making advances, and that, if at the end of six months the balance is with A., he will lend to B., and vice versa. I admit, generally, that cannot be applied to the case of real security; and you may not, when the debt comes to a certain sum, take a real security and five per cent. I do not know, if that would do in a mercantile transaction." According to the authorities, in order to support the balance here claimed by the mortgagee, there must have been, at or after the date of the different rests, a series of special agreements, that the interest previously accrued due *should thenceforward bear interest; and each of those agreements ought to have been in writ- [*351] [*352]

(*a*) 2 Salk. 449. (*b*) 1 P. Wms. 653. (*c*) 2 Ves. jun. 15. (*d*) 9 Ves. 223.

ing signed by the parties. It is not alleged that any such agreements were ever made; but it is suggested that a contract to that effect must be implied from the course of dealing between the parties. That course of dealing had gone on for many years before the date of the mortgage; so that the implied contract would be prior to the mortgage, and, therefore, could not make interest bear interest; the rule being, that the interest must become actually due, before it can be converted into principal.

Mr. *Pepys* and Mr. *Roupell*, for the mortgagees:—The deed of the 7th of October, 1815, is not a mortgage for a given sum and interest, but it is a security given to the bankers to cover whatever may be due to them from their customers the iron masters; and the only question is, whether as between customer and banker, there is any thing illegal in that mode of settling the accounts which the parties themselves followed throughout the whole course of their mutual dealings. It is evident from *Ex parte Bevan*, *Morgan* v. *Mather*, and *Caliot* v. *Walker*,(*a*) that accounts may be settled with half yearly and quarterly rests. The sum legally due from the iron masters to the bankers is the balance ascertained by the master; and till that balance is paid, the terms of the proviso for redemption are not satisfied.

Mr. *Bickersteth*, in reply, admitted, in answer to a question put by the court, that, if William Hornblower had not become bankrupt, and the bankers had brought an action against him for money had and received, they would have recovered in that action the several sums reported
[*353] *due by the master. But he contended that what might have been recovered in an action was no measure of the sum with which the land was to be charged; because, as against the land, rests could be made and interest could be converted into principal bearing interest, only by an agreement in writing made after the interest had become due, and signed by the debtor.

The Master of the Rolls:—It is very true that you cannot, in the ordinary case of a loan of money secured on land, stipulate *a priori*, that interest shall become principal.[1] The opinion, however, of Lord Cowper, in the case of *Lord Ossulston* v. *Lord Yarmouth*, that, as to mortgages, an agreement to convert interest into principal, after it is due, must be evidenced by writing, may admit of some question. When Lord Eldon, in the case of *Ex parte Bevan*, where he decides that rests may be made between merchants, afterwards adds, that the principle cannot be applied to the case of a real security, I must understand him to be speaking of a common mortgage security or loan of money.[2]

(*a*) 2 Anst. 495.

[1] Vide *The State of Connecticut* v. *Jackson*, 1 Johns. Ch. Rep. 13. *Quackenbush* v. *Leonard*, 9 Paige, 334.

[2] Mr. Chancellor Kent, in *Van Benschooten* v. *Lawson*, 6 Johns. Ch. Rep. 313, expresses himself in relation to the subject of compound interest, in such clear and emphatic language, that no apology can be requisite for the introduction of several sentences from his opinion in that case. After advert-

It being admitted that the mode of dealing between these parties by rests would, because it is according to the course of trade, support an action at law for the several balances reported due, I cannot apprehend any principle why in such case a security upon land may not be given for the final balance which may be due between the banker and his customer. I have looked with much anxiety through the books for authority upon this point; and I have fortunately found it in the case of *Lord Clancarty* v. *Latouche*.(a) There, upon a bill by the executors of Mr. Conolly [*354] against Messrs. Latouche, who had been his bankers, to redeem certain mortgages which Mr. Conolly had given them to secure such balance as might be due to Messrs. Latouche, Lord Manners affirmed this mode of dealing by rests, stating that the principle as to rests in common mortgages was not applicable to the case where the mortgage was made as a collateral security for the balance which might eventually be due from the customer to his banker. It is true that, in that case, Lord Manners has given annual rests only, and seems to throw some doubts upon rests at a shorter period: but it is admitted here that the shorter rests are legal. I must therefore overrule these exceptions.

The master, in the first part of one of the schedules to his report, distinguished such parts of the personal estate comprised in the mortgage as were

ing to his own former decision in *The State of Connecticut* v. *Jackson*, 1 Johns. Ch. Rep. 13—the language of Lord Chancellor Manners, 1 Ball & Beatty, 430—and *Thornhill* v. *Evans*, 2 Atk. 330, n. 1, he proceeds:—"In the case before me, the agreement of the debtor to allow interest upon the arrears, of interest, was retrospective in its operation. It was agreed on the 27th of May, 1817, to allow interest for the year preceding, on the interest which was due the year preceding; and this cannot be permitted, nor such an agreement recognized and enforced in this court. Compound interest can only be admitted on the fact of a written agreement, made *after* the interest upon which the agreement operates has fallen due; [thus conflicting with what is hinted above by the Master of the Rolls, as to the necessity of the agreement being in writing:] and to give such an agreement a retrospective effect leads to oppression. It is equally objectionable, as an agreement made at the time of the original contract or loan, that compound interest should begin and run upon the lawful interest the moment it falls due, whether payable yearly, half yearly, or quarterly; and such agreements are held to be oppressive. To exact from the debtor interest on the previous arrears of interest, without a previous special and particular agreement for that purpose, is inadmissible. It has no valid basis, nor any acknowledged legal consideration, on which it can rest, if the previous agreement, made at, or after the time the interest became due, be wanting. It is the agreement, and not the law, nor the delay of payment, that will turn interest into principal. If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would perhaps, be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest, when the original contract is about to be made. The parties are, then, independent of each other; but in the other case, the debtor is comparatively dependent, and probably distressed, and the creditor exacts the stipulation, under the evident advantage of power and superiority. The agreement, on the part of the defendant, to pay compound interest retrospectively, does not alter the case, for the maxim *volenti non fit injuria*, does not apply in these cases." But see *Mowry* v. *Bishop*, 5 Paige, 98, 102.

(a) 1 Ball & Beat. 420.

not in the order and disposition of the bankrupt at the time of his bankruptcy; and among these he included the furnaces, boilers, engines, wheels, retorts, gasometers, floor plates, cast-iron shears, &c., and, in short, all the
[*355] machinery and apparatus of an iron work.(a) The *articles contained in the schedule had produced 8775*l.* 3*s.* The second part of the schedule enumerated those parts of the personal estate comprised in the mortgage, which were in the order and disposition of W. Hornblower at the time of his bankruptcy; the amount yielded by the sale of them was only 9*l.* 17*s.*

The assignees insisted, by an exception to the report, that the whole, or nearly the whole, of the articles mentioned in the first part of the schedule, were in the order and disposition of the bankrupt at the time of his bankruptcy.

Affidavits had been produced before the master, on behalf of the assignees, in which people, who had been long employed in erecting and valuing iron works, stated that they were not aware that there was any usage or custom in the iron trade for letting the machinery of an iron work to a tenant; but the most usual practice of letting an iron work, where the same was a going work, was, that the tenant or party about to take a lease of the same, took to and purchased the machinery at a valuation from that point of the engine machinery which is termed the "fast crab," and which is the place where the motion is given to the rolls of machinery from the engine; and that, at the end of the term, the landlord either took to the machinery again at a valuation, or the tenant sold and disposed of the same. Other witnesses swore that there was no general custom or practice in letting iron works, but that the custom or usage is made subservient to, and entirely depends on, the nature of the works to be let, and the circumstances of the party about to take them.

[*356] *On the part of the mortgagees, affidavits were produced from nineteen iron masters well acquainted with the usage of the county of Stafford, with regard to iron works. According to their representations, "it is the constant custom of the iron trade to let iron works of the same description as those included in the mortgage: and the tenant, by the custom of letting, has always two inventories delivered to him. In one of these is included all machinery fixed and in a working state, and these the tenant un-

(a) To show more clearly than can be done by general words the species of articles which were adjudged not to be within the order and disposition of the bankrupt, the following items are selected as a specimen, from the first part of the schedule:—"Iron chest in office; grates in mansion-house; weighing machine, and clock; floor plates and boshes; grinding stone with cast iron ring shaft or axis, and wrought iron work in clay mill; wood turning lathe, with cast iron wheels, shafts, carriages head-stocks, rests, and popits, wrought iron and steel spindles, &c.; cast iron spur wheels and bevel wheels, and cast and wrought iron shafts and spindles, and carriages with long trains of solid and pipe shafts, communicating motion from the forge lathe wheels to the wood lathes; pair of large shears, and bed in puddler's forge; hollow force to filtering forge, enclosed in cast-iron plates, in wheels; hoop mill engine, thirty-nine inch cylinders; extra bed plate; street mill engine, thirty-eight inch cylinder.

dertakes to repair whenever any breakage or other casualty occurs, and to deliver it up, at the end of the term, in good working repair and condition. The other inventory includes all loose stock, such as rolls, holsters, pinions, &c. not fixed in the machinery, but lying on the premises for the purpose of being used to replace and repair those which are fixed; and this loose stock is always paid for by the tenant on entry." They added, that all the engines, furnaces, machinery, &c., which were enumerated in the first part of the schedule to the report, would be considered, according to the custom of iron masters and of the iron trade, as belonging to the first inventory, and were all necessary for an iron work which was in a working state: that the whole of such machinery was always fixed in the most permanent manner, being imbedded in, and by iron bolts bound down to, brick, mortar, and formed no part of the stock which is considered as belonging to the tenant; that, if any part of that machinery were removed, the works would not be considered complete, and the landlord would have to supply the deficiency at his own expense; and that there was nothing mentioned in that part of the schedule but the wheels, the trains of rolls, lathes, shears, &c. &c., engines, brickwork, furnaces, and other articles, which formed the first ground work of an establishment of this nature.

*Mr. *Bickersteth* and Mr. *Wakefield*, in support of the exception:—The greater number of the articles contained in the first part [*357] of the schedule cannot be said to have been fixed to the freehold in such a manner, that the person entitled to the freehold would take them as an appendage to it. They were mere utensils of trade; some of them were in no way fixed to the freehold; and, being all left by the mortgagee in the possession of Hornblower, and used by him in carrying on his trade, they must be considered as having been, at the time of his bankruptcy, in his possession, order, and disposition, within the meaning of the 21 Jac. 1, c. 19, s. 10, and 11. *Poole's case*,(a) *Ryall* v. *Rolle*,(b) *Lawton* v. *Lawton*,(c) *Lord Dudley* v. *Lord Warde*,(d) *Neate* v. *Ball*,(e) *Horn* v. *Baker*,(g) *Bryson* v. *Wylie*,(h) *Elwes* v. *Maw*,(i) *Buckland* v. *Butterfield*.(k) For instance, among the articles enumerated in this part of the schedule, we find an iron chest and some shelves.(l) How can such articles be considered as incorporated with the freehold?

If the master is right in his conclusion, it will follow, that, if Hornblower had died intestate, the whole of this apparatus would have descended with the freehold to his heir, and would not have been personal assets. Suppose that, instead of being the owner of the freehold, he had been merely a lessee for years, and had erected *the works with his own money, [*358] could the landlord, at the end of the term, have claimed all the arti-

(a) 1 Salk. 368. (b) 1 Atk. 165. (c) 3 Atk. 14. (d) Amb. 113. (e) 2 East, 117.
(g) 9 East, 215. (h) 1 Bos. & Pul. 83. (i) 3 East, 38. (k) 2 Brod. & Bing. 54.
(l) The wall had been cut away to admit the iron chest, and the drawers or shelves which were near to it.

cles enumerated in the first part of the schedule, and prevented the tenant from removing them? Unquestionably the greater part of them might have been seized under an execution.

Mr. *Pepys* and Mr. *Roupell*, contra:—There is clear proof, that it is customary in the trade to let such works as those which are comprised in the mortgage, and that such machinery and articles as those now in question are usually let as part of them. Under such circumstances, the possession of the machinery does not carry with it the reputed ownership, *Stewart* v. *Lamb*,(a) *Sinclair* v. *Stevenson*.(b) "If," says Lord Ellenborough, in *Horn* v. *Baker*,(c) "as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats, and other articles used by them for the purpose of distillery, the possession and use of such articles would not in such case have carried the reputed ownership."

Mr. *Robert Roupell*, on the same side, cited *Storer* v. *Hunter*.(d)

Mr. *Rose* and Mr. *Beames*, for subsequent mortgagees cited *Ex parte Smith*,(e) and referred to *Baker* v. *Simpson*(g) before Lord Eldon.

[*359] *Mr. *Bickersteth* in reply:—The evidence as to the existence of any usage in the trade is contradictory; and, even if the usage were established, it would apply only to works which had been actually let. Where a person is merely lessee of iron works, the title, by which he holds the lands and buildings, must be presumed to be in those who deal with him; and where the custom is to let the machinery along with the land and buildings, the mere possession cannot give him the reputation of absolute ownership. But the Hornblowers were not the lessees of these works: having in them the inheritance of the lands, and the absolute ownership of the machinery, they mortgaged both; and the mortgagee allowed them to remain in the possession and absolute disposition of the personal chattels which were comprised in the mortgage. William Hornblower was, in fact, the reputed owner of them at the time of his bankruptcy; and persons who dealt with him had no means of knowing that he had parted with his right of property in them nine years before.

The Master of the Rolls:—The real question here is, whether the possession of the articles in dispute necessarily inferred that the property in these articles belonged to the trader, so that he might acquire an additional credit from the fact of such possession. The evidence before the master established that it is the custom in the county of Stafford, when iron works are let, that articles of this description should be furnished by, and should continue to be the property of, the lessor. The mere possession of the bankrupt, therefore, did not necessarily infer the property in them, so as to

(a) 1 Bingh. 506. (b) 2 Bingh. 514. (c) 9 East, 215.
(d) 2 Barn. & Cres. 368. (e) Buck, 149. (g) Not reported.

gain him a false credit by the fact of possession. The exception must be overruled.

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*Some exceptions were taken by the assignees, because the master [*360] had set forth in his report certain parts of an affidavit, and had annexed to his report certain schedules and inventories, which, it was insisted, were wholly irrelevant to the accounts and inquiries directed by the decree, and occasioned great and unnecessary expense.

THE MASTER OF THE ROLLS stopped the counsel, who were about to argue in support of these exceptions, stating that an exception would not lie to the report of a master, upon the ground that he had introduced irrelevant matter.[1]

[1] "Exceptions to the report are only proper where the master has come to an erroneous conclusion upon some matter referred to him to ascertain and decide, and to report upon, as the immediate subject of the reference. Even where the master has introduced into his report matters which are wholly irrelevant to the accounts and inquiries directed by the order of reference, exceptions do not lie to his report on that account. The proper course for the party aggrieved by the introduction of such irrelevant or impertinent matter, is to apply to the court directly, by motion, to expunge the impertinent matter; as it would be improper to refer it to one master to review the report of another in this respect." Walworth, Ch. *Tyler* v. *Simmons*, 6 Paige, 131.

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INDEX

TO

THE PRINCIPAL MATTERS.

ADVANCEMENT.

In 1779, S. L., in contemplation of his marriage with A. V., covenanted for the payment of 3000*l.* within three months after his decease, for the benefit of the children of the marriage; in 1815, upon the marriage of Emma, one of his daughters by A. V., he executed a deed, which recited that it had been agreed, that by way of additional portion for Emma, he should enter into a covenant, that she should have an equal share at least with his other children, of the real and personal estate which he should be entitled to at his decease, after payment of his debts; and that any money or other estate and effects which any of the children might receive in the lifetime of S. L., or might become entitled to under or by virtue of any gift or disposition by will or otherwise, made or to be made by A. V., the mother, or otherwise howsoever under her, should be deemed an advancement within the meaning of the indenture. This recital was followed by a covenant, that his heirs, &c. should within three months after his death convey to the trustees of Emma's settlement a share of his real and personal estate, equal to the share which any other of his children should have had or be entitled to; and afterwards came a proviso, that any money and other estate and effects which might afterwards be conveyed or advanced by S. L. to any of his children, and also that certain copyholds, of which A. V. was tenant in tail, whose interest, it was stated, was forthwith intended to be barred, and further, that any money, or other estate and effects, which any of the children might receive by the gift, bequest, or other disposition by will or otherwise of A. V. or under the statute of distributions in case of her intestacy, or which any of them should derive by, from, or under her by any ways or means, should be deemed an advancement within the meaning of the covenant. No act was done to bar the estate tail of A. V. in the copyholds, and on her death and the death of S. L., the eldest son and customary heir became entitled to the copyholds under the limitations in the surrender, which created the estate tail: Held, that these copyholds were to be considered as an advancement to the eldest son, within the meaning of the covenant.

That the 3000*l.* due under the covenant of 1779, was to be paid before any part of the assets could be applied in satisfying the covenant contained in the deed of 1815. *Bailey* v. *Lloyd*, 330

AFFIDAVIT.

See PRACTICE, 3.

AGREEMENT.

A patient executed instruments, whereby he secured to the defendant, his surgeon, an annuity of 100*l.* during the life of the defendant, in consideration that the defendant would live with him and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the defendant called in an eminent physician to visit the patient, who stated to the defendant his opinion that the patient could not recover nor live long; and, about the same time, the defendant expressed to a witness in the cause, that the patient could not live more than a month or six weeks.—These instruments cannot be maintained, even if the patient were of sound mind and capable of business. *Popham* v. *Brooke*, 8

AMENDMENT.

See NE EXEAT REGNO.

ARMY AGENT.

Moneys issued by the crown to an army agent for the pay, subsistence, &c. of officers, and carried in the books of the agent to the credit of the respective officers, but not paid over to them, and not made the subject of any private arrangement with them, continue the moneys of the crown in the hands of the agent, for which he is accountable to the crown; and may be called back by the attorney general, as representing the crown, even after a lapse of more than thirty years. *Brummell* v. *Macpherson*, 263

ARREST.
See PRIVILEGE FROM ARREST.

BANKRUPT.

1. A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly: a bill was filed on behalf of the creditors of Wilkinson under the commission, claiming the lease as part of his estate; and the court directed an issue to try whether W.'s name was used in the lease as a trustee for R.: Held,
   That the issue was properly directed. *Gardner* v. *Rowe*, 258
2. The jury having found a verdict in the affirmative: Held,
   That the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to Wilkinson's assignees. Id.

BARON AND FEME.

1. A decree may be made by consent in a cause, relating to the separate property of a married woman, in which she and her husband are co-plaintiffs. *Stinson* v. *Ashley*, 4
2. A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock, which was standing in the name of a trustee for her; this stock was under an order made in the lunacy, transferred into the name of the accountant general, in the matter of the lunacy, and part of it was afterwards sold out, and applied to the payment of costs; the lunatic died leaving his wife him surviving: Held, that the stock had been reduced into the possession of the lunatic, and that the wife was not entitled to it by right of survivorship. *In the matter of Jenkins*, 183
   See WITNESS.

BILL OF REVIEW.
See PLEADING.

BREACH OF TRUST.
See EXECUTOR AND ADMINISTRATOR, 1.

CANCELLATION.
See AGREEMENT.

CHARITY.

1 A legacy was given to the Guernsey Hospital; there were two hospitals in Guernsey, and the master reported that he could not find which hospital was intended. It was held that the legacy was not void for uncertainty, but was well given to a charitable purpose. *Simon* v. *Barber*, 112
2. Where a testator gives a legacy to a voluntary society which exists at his death, but is dissolved before his assets can be administered, the court will execute his intention *cy-pres*. *Hayter* v. *Trego*, 113

COLLEGE ELECTIONS.

1. The statutes of Queen's College, Cambridge, direct certain elections to be made by the president and the majority of the fellows: Held, that the concurrent voice of the president is necessary in all such elections. *In the matter of Queen's College, Cambridge*, 64
2. The statutes of Clare Hall, Cambridge, provide "that the election of a fellow shall be by the master, and the major part of the fellows present:" Held, that a valid election might be made without the concurrent voice of the master. *The Case of Clare Hall*, 75 n.
3. In Caius College, Cambridge, the election of a fellow is to be by the master and the major part of the fellows: Held, that an election by the major part of the persons entitled to vote in the election is valid, though the master refuses to concur with them. *Case of Gonvilles and Caius College*, 76 n.
4. In Catharine Hall, Cambridge, the election of fellows is to be "communi omnium assensu aut saltem ex consensu magistri et majoris partis communitatis:" Held, that no election was valid in which the master did not concur. *Case of Catharine Hall*, 85 n.

COMMISSION OF REVIEW.

A commission of review will not be granted, unless there is clear error in law, or a clear mistake as to fact, in the judgment of the court below, or unless the case involves an important and doubtful question of law, which ought to be decided in the most solemn form. *Dew* v. *Clarke*, 163

COMPOUND INTEREST.

Where a mortgage of land is made, by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance, that it has been partly composed of interest turned into principal by rests, and interest on that interest, according to the course of dealing between a banker and his customers. *Rufford* v. *Bishop*, 346

COMPROMISE.

If a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made bona fide, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement; and a court of equity, without considering whether he was in truth liable to the claim, will compel a specific performance. *Attwood* v. ———, 149

CONSIDERATION.
See COMPROMISE.

CONSTRUCTION.

The recital of a deed is a key to the construction, where the operative part is doubtfully expressed, and not otherwise. *Bailey* v. *Lloyd*, 330

COPYHOLD.
See ADVANCEMENT.

COVENANT.
See ADVANCEMENT.

COSTS.

1. Before the new orders, where an order directed that a master should tax costs, in case the parties differed about the same, the party claiming the costs was at liberty to proceed in the first instance to have the costs taxed before the master, without previously delivering a bill to the party required to pay the same, or to his solicitor. *Aubrey* v. *Hoper*, 1
2. A foreigner who claimed to be a creditor of the testator in the cause, petitioned to have his claim referred to the master, after he had made his report: the court made the order, upon condition of his giving security for the costs. *Drever* v. *Maudesley*, 11

CREDITOR.

1. Where great delay has occurred in the prosecution of a decree for the administration of assets, a creditor may apply to have the conduct of the cause, though it has become abated by the death of a defendant. *Cook* v. *Bolton*, 282
2. A plaintiff who sues as creditor, will not be deprived of the conduct of the suit, because the master has reported that he is not a creditor, if exceptions to that finding of the report are pending, and there is no reason to suppose that the exceptions will not be prosecuted actively, *Jeudwine* v. *Agate*, 283

CY-PRES.

Where a testator gives a legacy to a voluntary society, which exists at his death, but is dissolved before his assets can be administered, the court will execute his intention *cy-pres*. *Hayter* v. *Trego*, 113

DECLARATION OF TRUST.
See ISSUE, 1, 2.

DECREE.

1. In a suit against defendants who were personal representatives both of a testatrix, who died during coverture, and of her husband, praying an account of her separate estate, and a declaration that certain sums of stock, which stood and always had stood in her name, constituted part of that estate, although the husband and his executors, during a long period of years had uniformly acknowledged these sums to be, and dealt with them as being part of her separate property, and although strong evidence was adduced by the plaintiff, which was not met by any evidence on the other side; yet the court refused to make the declaration at the original hearing; and only referred it to the master to take the account generally, with special inquiries founded upon the evidence. *Hornby* v. *Hunter*, affirming S. C. 1 Russ. 89, 149
2. Where an inquiry as to debts has been directed before decree, and the master has reported that there are no debts, the decree at the original hearing must nevertheless direct an account of debts. Id.

See PRACTICE, 7.

DEED.

The recital of a deed is a key to the construction, where the operative part is doubtfully expressed, and not otherwise. *Bailey* v. *Lloyd*, 330

DOWER.

A being tenant for life of certain lands, remainder to his first and other sons in tail male, remainder over, upon his marriage with an infant, by a settlement to which her father was a party, granted a rent charge issuing out of part of these lands to trustees for her, by way of jointure, and in lieu of dower; and subsequently, during the coverture, this rent charge was confirmed by the person, who, upon failure of male issue of A., would be entitled to the property; there were no legal sons of the marriage: held, that the widow of A. was, in equity, barred of her dower. *Corbet* v. *Corbet*, 254

EQUITABLE MORTGAGE.

W. holding title deeds as an equitable security for a debt due to him from N., and being also solicitor of S., to whom N. owed a sum of money, for which S. held other securities; N. wrote a letter, which was left at the office of W., stating that he, W., out of the proceeds of the sale of the property, of which he held the title deeds, was to receive the amount both of his own debt and of the debt due to S.; afterwards W. received from N. the amount of his own debt, and without the sanction of S. delivered up the title deeds in his possession to N. who sold the property, received the purchase money, and did not pay any part of it to S.; *Semble*, W. is in point of law liable to S. for any loss which S. may thus sustain. *Attwood* v. ———, 149

EVIDENCE.
See PRACTICE, 5.

EXCEPTIONS TO REPORT.

An exception does not lie to a master's report, upon the ground that he has therein stated irrelevant matter. *Rufford* v. *Bishop*, 346

EXECUTOR AND ADMINISTRATOR.

1. Where a testator authorizes his three executors to lend money on personal security, it is a breach of trust, if two of the executors lend it to the third. ——— v. *Walker*, 7
2. An administrator does not lose his right of retainer by paying the assets into court. *Chissum* v. *Dewes*, 29
3. Where the fund in court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. Id

4. A. appoints executors who prove his will in the prerogative court; B., the surviving executor, dies, having appointed C. his executor, and C. proves B.'s will in the consistory court of Landaff: C. is the personal representative of A. *Fowler* v. *Richards*, 39

FEIGNED ISSUE.
See ISSUE.

FIXTURES.

Machinery affixed to the freehold of iron works, is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron works are let, such articles are furnished by and continue to be the property of the lessor. *Rufford* v. *Bishop*, 346

GOODWILL.

The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt: Held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the goodwill, or from the value of the lease independently of the goodwill. *Chissum* v. *Dewes*, 29

INJUNCTION.

On an application for an injunction to restrain the infringement of a patent, the party must swear, that at the time of making the application, he believes that at the date of the patent, the invention was new, or had not been previously known or used in this kingdom. *Sturz* v. *De La Rue*, 322

INTEREST.
See COMPOUND INTEREST.

JOINTURE.
See DOWER.

ISSUE.

1. A lease was granted to W. who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R, and declaring the trust accordingly: a bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate; and the court directed an issue to try, whether W's. name was used in the lease as trustee for R: Held that the issue was properly directed. *Fardner* v. *Rowe*, 258
2. The jury having found a verdict in the affirmative: Held that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W's. assignees. Id.
3. When it is necessary to produce a record of the court on the trial of an issue, the party must procure the proper officer to attend with it; and an order will not be made directing the officer to deliver the record to any other person for the purpose of being produced. *Gretham* v. *Bell*, 161

LEGACY.

1. A testator gives to his wife an annuity of 100*l.* and the sum of 1000*l.*, which he considers will, with the property which she is entitled to after his death, make up to her an income of 2500*l.* a year; in fact those gifts make up her income only to 1800*l.* a year, she is entitled to have the deficiency supplied out of his residuary estate. *Trevor* v. *Trevor*, 24
2. A legacy was given to the Guernsey Hospital; there were two hospitals in Guernsey, and the master reported that he could not find which hospital was intended. It was held that the legacy was not void for uncertainty, but was well given to a charitable purpose. *Simon* v. *Barber*, 112
3. Where a testator gives a legacy to a voluntary society, which exists at his death but is dissolved before his assets can be administered, the court will execute his intention *cy-pres*. *Hayter* v. *Trego*, 113

LENGTH OF TIME.
See ARMY AGENT.

LUNATIC.

1. The court will not give any directions touching the property of a person of unsound mind, where no commission of lunacy has issued, though the fortune of such person consist only of an annuity of 50*l.* and 150*l.* of arrears; and though the next of kin and the parties, who have to pay the annuity, submit to such order as the court may make. *Ex parte Ridgway*, 152
2. An allowance will be made out of a lunatic's estate for his illegitimate children, but not for their mother. *Ex parte Haycock*, 154
3. The court will not direct property to be sold, which the lunatic, by a will made when of sound mind, has bequeathed specifically, though the master has reported that the sale of it will be beneficial to the estate. Id

See BARON & FEME, 2.

MACHINERY.
See FIXTURES.

MARSHALLING ASSETTS.

Personal estate may be exempted from the payment of debts, without express words to that effect, upon the clear intention of the testator. *Dawes* v. *Scott*, 32

MIXED FUND.

Where a testator directs his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gives the residue of the mixed fund to A. and B., the failure of the charitable legacies, as far as they would affect

the real estate, will enure to the benefit of A. and B. *Green* v. *Jackson*, 35

MORTGAGE.

1. Where a mortgage of land is made by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance, that it has been partly composed of interest turned into principal by rests, and interest on that interest, according to the course of dealing between a banker and his customers. *Rufford* v. *Bishop*, 346
2. The unexpired term in a house, and the good will of a business established in it were sold in a creditor's suit, with the consent of the person with whom the lease had been deposited as security, and brought a price less than the amount of his debt: Held that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the good will, or from the value of the lease independently of the good will. *Chissum* v. *Dewes*, 29

See EQUITABLE MORTGAGE.

MONEY TO BE INVESTED IN LAND.

Where money is to be invested in the purchase of land, there the court can make no other order, under the 7 G. 4, c. 45 than that, subject to the antecedent uses, the estate shall be settled to the use of such person or persons who would have been entitled to the estate tail, his, her or their heirs and assigns. *In re Peyton*. 5

NE EXEAT REGNO.

A writ of *ne exeat regno*, will not be discharged, nor will the recognizances of the sureties be vacated, because the bill has been subsequently amended under a common order, where the amendments do not vary the substance of the plaintiff's case. *Grant* v. *Grant*, 189

PATENT.

1. A clerical error in the enrollment of the specification of a patent will be amended. *In re Redmund*, 44
2. An invention for giving paper, by the application of a certain composition, such a surface as renders the lines of copper and other plate printing more clear and distinct, may properly be described in a patent as an improvement in copper and other plate printing. *Sturz* v. *De la Rue*, 322
3. One of the ingredients in the composition was a white substance, imported from Germany, and which could be purchased at one or two color shops in London; the only description or denomination given to it in the specification was, "the purest and finest chemical white lead;" but there was no article known by that denomination in the trade, or in the shops where white lead is usually sold; and the finest white lead which could be obtained would not answer the purpose: Held, that the specification was insufficient. Id.
4. On an application for an injunction to restrain the infringement of a patent, the party must swear, that, at the time of making the application, he believes that at the date of the patent the invention was new, or had not been previously known or used in this kingdom. Id.

PLEADING.

1. Matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a supplemental bill in the nature of a bill of review. *Partridge* v. *Usborne*, 195
2. A party may obtain leave to file, and may file a supplemental bill in the nature of a bill of review, though he has not performed the decree in the original cause, if the proceedings under the decree are not at the time in such a state as to enable the adverse party to bring him into default for not having done what the decree orders, Id.
3. A party will not be allowed, except under very special circumstances, to file a bill of review or a supplemental bill in the nature of a bill of review, or to prosecute it after he has obtained leave to file it, unless he performs at the proper time all that the decree commands him to do. Id.
4. A purchaser who was defendant in a suit for specific performance, did not in his answer mention any warranty given, or representation made by the vendor, and insisted merely that a good title was not shown; a reference on the question of title was ordered; the master reported in favor of the title, and a decree for specific performance was pronounced. After the order of reference had been made, the defendant discovered that the timber on the estate which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty having been given was strongly controverted: under these circumstances leave was given to file a supplemental bill in the nature of a bill of review, in order that the defendant might have the same benefit of the alleged warranty, as if he had originally insisted upon it in his answer. Id.
5. After leave given he has a right to file such a bill without having previously paid the purchase money which the decree commands him to pay, if the time, at which the adverse party, in the due execution of the decree, can compel payment, has not yet arrived. Id.
6. *Semble*, As soon as that time arrives, he will not be allowed to proceed with his bill, until he pays the purchase money to the vendor; and such payment will not be dispensed with, nor will payment of the money into court be allowed to be substituted for it, though the sum be very large. Id.

POWER.

1. Whether a testator intended by his will to execute a power, is to be collected from the whole instrument, and not from the force of any particular expression. *Bailey* v. *Lloyd*, 330
2. In this case, the testator devised his estates,

and made disposition of part of the fund to be produced by the sale of the estates, to purposes not warranted by the power; but still, upon the whole will, the court held that he intended to execute the power. Id.

See ADVANCEMENT.

PRACTICE.

1. Rule of practice at the rolls—that in future, not more than two counsel shall be heard in support of a motion for the new trial of an issue, nor more than the same number in opposition. 23
2. Where much expense had been incurred in the suit, and it appeared defective in form at the hearing, the court directed the cause to stand over with liberty to file a supplemental bill to correct the form. *Mutter* v. *Chauvel.* 42
3. Answering an affidavit is a waiver of any objection which might be taken to it, on the ground of notice not having been given that it was to be used. *Blackmore* v. *The Glamorganshire Canal Company,* 151
4. Where it is necessary to produce a record of the court on the trial of an issue, the party must procure the proper officer to attend with it; and an order will not be made directing the officer to deliver the record to any other person for the purpose of being produced. *Gretham* v. *Bell,* 161
5. A party on a special application may obtain an order to prove *viva voce*, on a rehearing, documents which were not in evidence at the former hearing, but he must pay the costs of the application. *Higgins* v. *Mills.* 287
6. An exception does not lie to a master's report, upon the ground that he has therein stated irrelevant matter. *Rufford* v. *Bishop,* 346
7. A decree may be made by consent in a cause relating to the separate property of a married woman, in which she and her husband are coplaintiffs. *Stinson* v. *Ashley,* 4

See DECREE, 1, 2.

REVIVOR.

See SECURITY FOR COSTS.

PRIORITY.

A contracted for the purchase of certain lands, which were subject to a first mortgage to M., and to a second mortgage to P.; one of the terms of the agreement being, that out of the purchase money A. should retain in his hands the sum of 5010*l.* in order to pay off these incumbrances; and by indentures of lease and release, reciting the mortgages, the estate was conveyed to him. Afterwards M., in consideration of 3220*l.* stated to have been paid to him by A., conveyed by A.'s direction, the premises to G. in fee, and it was declared, that a trustee of an outstanding term should hold that term in trust for G., to attend the inheritance. By another indenture of the same date, and executed at the same time, reciting that W. had agreed to purchase of A. an annuity of 500*l.* for 5000*l.*, and that the 3220*l.* was in fact the money of W., and part of the 5000*l.*, and was paid to M. by W.'s agent, at A.'s request; A. in consideration of the 3220*l.* and of 1780*l.*, granted to W. an annuity of 500*l.*, to be issuing out of the lands; and G., by A.'s direction, demised the premises to a trustee for 500 years, upon trust, to secure the rent charge: Held, that P. was now the first incumbrancer, and that W. was not entitled, to the extent of the money paid to M., to have M's mortgage considered as still subsisting, and to have what might be payable in respect of it, applied from time to time in satisfaction of the arrears of his annuity. *Parry* v. *Wright,* 142

PRIVILEGE FROM ARREST.

A person having been taken in execution upon a *ca. sa.* within the outer door of the Vice-Chancellor's court in Lincoln's Inn, while the court was sitting, the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and having examined the officer, discharged the prisoner immediately. *Orchard's Case,* 159

REPORT.

An exception does not lie to a master's report upon the ground that he has therein stated irrelevant matter. *Rufford* v. *Bishop,* 346

REHEARING.

See PRACTICE, 5.

RES JUDICATA.

A second incumbrancer filed a bill in Grenada, to which the mortgagor and first incumbrancer were parties defendants, impeaching one of the deeds under which the first incumbrancer claimed, and praying that the equity of redemption of the mortgaged premises might be sold. By a decree made in that suit, the court in Grenada declared the impeached deed void, the effect of which was to reduce considerably the claim of the first incumbrancer: he, therefore appealed from that decree to the privy council, who reversed the decree of the court in Grenada, and established the deed in question. Before that suit was finally concluded, the mortgagor filed a bill here against the first incumbrancer for redemption, praying that the same deed might be declared void, which had been affirmed by the privy council:—his bill was dismissed with costs, on the ground that he was concluded by the decree of the privy council from raising, in a new suit, the question as to the validity of that instrument. *Farquharson* v. *Seton,* 45

RETAINER.

1. An administrator does not lose his right of retainer by paying the assets into court. *Chisum* v. *Dewes,* 29
2. Where the fund in court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. Id.

REVIEW.

See PLEADING.

REVIVOR.

It is not necessary to bring a suit of revivor, in-

stituted by the personal representatives of a defendant, to a hearing, in order to make the order of revivor effectual against both the plaintiffs and the co-defendants. *Pruen* v. *Lunn*, 3

SECURITY FOR COSTS.

A foreigner who claimed to be a creditor of the testator in the cause, petitioned to have his claim referred to the master, after he had made his report: the court made the order, upon condition of his giving security for the costs. *Drever* v. *Maidesley*, 11

SETTLEMENT.

A settlement, after limiting two estates to A. for life, remainder to his first and other sons in strict settlement, remainder to M. for life, with remainder over, required each person when in possession to assume the name and arms of the settlor; gave to the tenants for life powers of leasing and of charging the estates with a jointure of 400*l.* a year, and a sum of 2000*l.* for younger children; and reserved to the settlor a power of revocation and new appointment as to one of the estates. The settlor subsequently exercised that power by revoking, as to one of the estates, the remainder to M. for life, and the limitations over; and by appointing that estate to S. for life, with remainders over; and by the deed of revocation and new appointment, he imposed upon each of them, A. and S., when entitled as tenants for life in possession, "under the limitations aforesaid," the condition of assuming his name and arms, and gave them the power of charging the estate with a jointure of 400*l.* and with 3000*l.* for younger children, but directed that there never should be more than the yearly sum of 400*l.* a year payable out of any part of the premises as a jointure at one time:

Held, that the second deed did not give A., when tenant for life in possession, the power of appointing a second sum of 400*l.* as a jointure to his wife. *Wigsell* v. *Smith*, 299

SUPERSTITIOUS USE.

A sum of 3 per cent. stock having been transferred by A. into the name of himself and of three trustees, a deed was executed in England by him and them, declaring they were to hold the stock upon trust to pay the dividends to A. during his life; and, after his death, to apply them in printing and promoting the circulation of a treatise written in French and Latin, which inculcated the doctrine of the absolute and inalienable supremacy of the pope in ecclesiastical matters; and the deed contained a proviso, that if any court of law or equity should declare any of the trusts to be void, the trustees should stand possessed of the stock in trust for A.'s executors or administrators: Held,

That the trusts after A.'s life interest were void, as being contrary to the policy of the law and in the nature of a superstitious use:

That the fund was not subject to a general trust for charity, so as to be applicable to any other charitable purpose, according to the pleasure of the crown suggested under the sign manual: and

That A. was entitled to have the fund retransferred to him. *Themmines* v. *De Bonneval*, 288

SUPPLEMENTAL BILL.
See PLEADING.

TRUST.
See ISSUE, 1, 2.

TRUSTEE.

1. The executor of a surviving trustee appointed three executors, who in an adverse litigation procured probate of his will to be decreed to them, but afterwards refused to take out probate. They are legal personal representatives of the surviving trustees, within the meaning of 6 G. 4, c. 74: and an order will be made under that act for the transfer of stock standing in the trustee's name. *Ex parte Winter*. 284
2. An affidavit that they refuse to take out probate of the testator's will, is not sufficient to ground an order under the act; it should state that they refuse to take the steps necessary for enabling them to transfer. Id.

VENDOR AND PURCHASER.

1. A purchaser, who was defendant in a suit for specific performance, did not in his answer mention any warranty given, or representation made by the vendor, and insisted merely that a good title was not shown; a reference on the question of title was ordered; the master reported in favor of the title, and a decree for specific performance was pronounced. After the order of reference had been made, the defendant discovered that the timber on the estate, which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty having been given was strongly controverted: under these circumstances leave was given to file a supplemental bill in the nature of a bill of review, in order that the defendant might have the same benefit of the alleged warranty, as if he had originally insisted upon it in his answer. *Purtridge* v. *Usborne*, 195
2. After leave given, he has a right to file such a bill without having previously paid the purchase money which the decree commands him to pay, if the time, at which the adverse party in the due execution of the decree, can compel payment, has not yet arrived. Id.
3. *Semble*, As soon as that time arrives, he will not be allowed to proceed with his bill, until he pays the purchase money to the vendor; and such payment will not be dispensed with, nor will payment of the money into court be allowed to be substituted for it, though the sum be very large. Id.

WILL.

1. Where a testator gives to one person "all his

moneys in hand;" and to another "all his moneys out on securities;" the balance at his banker's will pass as money in hand. *Vaisey* v. *Reynolds*, 12

2. A gift of "all farming stock" will not as against the devise, pass crops on the ground, unless there be a plain intention that the legatee of the farming stock is to take all the personal estate. Id.

3. A tenant for life of a plantation in Jamaica bequeaths and devises to A., his heirs, executors, administrators, and assigns, all her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses and other live and dead stock upon that plantation, and all other her real estate in Jamaica; and, after various specific and pecuniary, legacies, she gives the residue of her goods, chattles, and personal estate and effects to B; A. is entitled to the growing crops, which were on the plantation at the death of the testatrix. *Blake* v. *Gibbs*, 13n

4. A testator devised a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm; and he bequeathed the residue of his estate and effects, real and personal, to his wife absolutely.

The testator died in July; the wife, having severed the growing crops and stacked them on the farm, died in the following September, when the remainder man entered and took possession both of the farm and of the crops which had been so severed: Held, that the personal representative of the wife was entitled to those crops. *Steward* v. *Cotton*, 17n

5. A testator having appointed three trustees, and made moderate provisions for his three sons, directed all the furniture, &c. in his mansion house at B. to be sold, "except such parts thereof as his said trustees should think necessary to be kept for receiving any of them, or of the testator's sons who should choose to go and spend a little time there occasionally:" and he bequeathed the great bulk of his property upon trust to be accumulated, and at the end of the period of accumulation to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given. Under the direction of the court, a liberal establishment had been maintained at B. at the expense of the estate: Held,

That the privilege of residing occasionally at the mansion house at B., and of enjoying the benefit of the establishment there, was confined to trustees and to the sons of the testator, and could not be extended to a grandson of the testator, nor to an infant great grandson who was the person presumptively entitled to a share of the property at the expiration of the period of accumulation.

That this privilege was not confined to the individuals named as trustees in the will, but extended to trustees substituted in the place of those individuals. *Thellusson* v. *Woodford*, 100

6. Construction of will. *Houston* v. *Hughes*, 116

7. Implication of estates tail. Id.

8. A testator, in a very ungrammatical and obscure will, devised real and personal property so as to vest the whole legal interest in trustees, in trust for A. and B., during their lives, to their separate use: some unfinished and unconnected portions of sentences succeeded, and these were followed by a direction, that, after the decease of A. and B., and failure of their male issue, the property should go to the granddaughters: A. and B. had each only one child, a daughter, and both these daughters were mentioned in the will: Held, upon the whole context of the will, that A. and B. were only tenants for life, and that an estate in tail male was not to be raised in them by implication Id.

9. A will was held to be invalid, on the ground that the testator, though sane in his general conduct, labored under an unsound delusion of mind with respect to his only child. *Dew* v. *Clarke*, 163

10. A testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directs her jewels to be sold: afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds: the testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed: Held, that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were to be sold, and did not pass to B.:

That the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls. *Attorney General* v. *Harley*, 173

11. Construction of a will as to what will pass under the description of "furniture." *Cremorne* v. *Antrobus*, 312

12. A testator by his will bequeathed his leasehold dwelling house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling house, or the out houses and offices appurtenant thereto, and by him [illegible]sed, occupied, and enjoyed therewith: by a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:" Held, that pictures placed in the house as ornamental furniture, and the plate and linen, passed by the codicil; but that the codicil had no operation

on the disposition made by the will of the books, the gold and silver coins, trinkets, and things of that nature. Id.

13. Personal estate may be exempted from the payment of debts, without express words to that effect, upon the clear intention of the testator. *Dawes* v. *Scott*, 32

See MIXED FUND.

WITNESS.

Where the wife is one of several persons claiming to be entitled as next of kin, to share in residuary property, which is under the administration of a court of equity, the husband is not a competent witness, upon an issue to prove her consanguinity to the testator. *Gregg* v. *Taylor*, 19

WRIT OF ERROR.

After a writ of error *non pros'd* in the exchequer chamber, the plaintiff in error brought a writ of error returnable in parliament, which recited that the judgment of the court below had been affirmed in the exchequer chamber; the latter writ was superseded with costs. *In the matter of Plaskett and Bonner*, 155

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR LYNDHURST.

BY JAMES RUSSELL AND J. W. MYLNE, ESQS.
BARRISTERS AT LAW.

WITH NOTES AND REFERENCES,

TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY JOHN A. DUNLAP,
COUNSELLOR AT LAW.

VOL. I.

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SIR EDWARD B. SUGDEN, Solicitor General.

A

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

A

Ackland, Attorney General v. . . 243
Acraman v. Bristol Dock Company . 321
Adams, *in re* 112
Anonymous 113
——— 330
Ansley v. Bainbridge 657
Archbishop of Canterbury, Paice v. 759n
Archer, Collins v. 284
Arnold v. Congreve 209
Arnitt, Naylor v. 501
Ashley, *in re* 371
Ashton, Lynn v. 188
Attorney General v. Ackland . . 243
——————— v. Christ's Hospital 636
——————— v. Pembroke Hall . 751
Avery, *in re* 356

B

Badham v. Mee 631
Bagley v. Mollard 581
Baily v. Taylor 73
Bainbridge, Ansley v. 657
Baker v. Bent 224
Balguy, Fosbrooke v. 624
Ball v. Etches 334
Banks v. Sladen 216
Barnes v. Wilson 1, 486
Barton v. Tattersall 237
Bent, Baker v. 224
Bentley, Sheratt v. 655
Barney, West v. 431
Best, Freme v. 79
——, Rayley v. 659
Beverley, Crossley v. 166n
Bickley v. Guest 440
Bingham v. Woodgate . . . 32, 750
Bird v. Hustler 325
Boghurst, Preble v. 744
Bolland, Bozon v. 69
Bourn v. Gibbs 614
Bowsher v. Watkins 277
Bozon v. Bolland 69
Bradshaw v. Bradshaw 358
Breedon v. Breedon 413
Bristol Dock Company, Acraman v. . 321
Brough v. Oddy 55
Brown v. Brown 77
Bryan, Wagstaff v. 28
Buckle, *in re* 360
Burch v. Rich 156
Burkett v. Spray 113
Byam v. Munton 503
Byng, Fraser v. 90

C

Campbell v. Graham 453
———, Gray v. 323
———, Smith v. 321
Cavendish, Plunkett v. 713
Chambers, *Ex parte* 577
Champion v. Rigby 539
Cholmeley, Cockerell v. 418
Christ's Hospital, Attorney General v. 626
Churchman v. Ireland 250
Clarence Railway Company, Coats v. 181
Clarke, *Ex parte* 563
——— v. Dew 103
Clayton, *Ex parte* 369
Coates v. Hawkyard 746
———, Sheriff v. 159
Coats v. The Clarence Railway Company 181
Cocker v. Quayle 535
Cockerell v. Cholmeley 418
Cockle v. Whiting 43
Collins v. Archer 284
——— v. Shirley 638
Comber v. Graham 450
Congreve, Arnold v. 209

Congreve, Hichens v. 150n
Cooper v. Reilly 560
Coster v. Turnor 311
Cottingham v. Potts 81
Courtauld, Harrison v. 428
Crawfurd, Winterton v. 407
Critchett v. Taynton 541
Crosbie v. The Mayor of Liverpool . 761
Crossley v. Beverley 166n
Croxall, Pigott v. 428n
Cunynghame v. Thurlow . . . 436n

D

Dalby v. Pullen 296
David v. Rees 687
Davidson, Stratton v. 484
Davis v. Davis 645
——— v. Spurling 64
——— v. Thomas 506
Dawson v. Hearn 606
De Geneve v. Hannam 494
Dew, Clarke v. 103
Dod v. Herring 153
Dove v. Everard 231
Draper, Pritchard v. 191
Driver v. Ferrand 681
Dunn, Ponton v. 402
Dyer, Tarleton v. 1, 486

E

Earle v. Pickin 547
Egerton v. Jones 694
England, *in re* 499
Esdaile v. Gall 540
Etches, Ball v. 324
Evans, Smith v. 80
Everard, Dove v. 231
Everest, Young v. 426

F

Fallows, Osbourn v. 741
Farrow, *Ex parte* 112
Fawcett v. Whitehouse 132
Fellowes v. Lord Gwydyr . . . 83
Fereday v. Wightwick 45
Ferguson v. Tadman 331
Fernes v. Hutchinson 22
Ferrand, Driver v. 681
Fitch, *in re* 354
Fosbrooke v. Balguy 624
Fowler v. Garlike 239
Franco, Torres v. 949
Fraser v. Byng 90
Freme v. Best 79
Froude, Walmsley v. 334
Fuller, Parker v. 656

G

Gall, Esdaile v. 540
Garlike, Fowler v. 232
Garrat v. Niblock 629
Gascoigne, Hungate v. 698
Geddes, Vawdry v. 203
Gedge v. Traill 281n
Gell, Hunloke v. 515
Gibbs, Bourne v. 614
——— v. Phillipson 19
Godfrey v. Littel 59
Grafton v. Griffin 336
Graham, Campbell v. 453
———, Comber v. 450
Gray v. Campbell 323
Green v. Spicer 395
Greenwood v. Taylor 185
Greig v. Somerville 338
Griffin, Grafton v. 336
Guest, Bickley v. 440
Gwydyr, Fellows v. 83

H

Hair v. Woodbridge 5n
Hall, White v. 332
Halliley, Wilson v. 590
Halliwell v. Tanner 638
Hannam, De Geneve v. 494
Hanson, Scott v. 128
Harding, Livesey v. 636
Harrison v. Courtauld 428
——— v. Harrison 71
Hawkyard, Coates v. 746
Hearn, Dawson v. 606
Herring, Dod v. 153
Hibbert, Simond v. 719
Hichens v. Congreve 150n
Hodges v. Horsfall 116
Hoggart v. Scott 293
Holmes v. Holmes 660
Horsfall, Hodges v. 116
Howes, Humphreys v. 639
Hullet, King of Spain v. . . . 7n
———, Mendizabel v. 324
Humphreys v. Howes 639
——— v. Wagstaff 529
Hungate v. Gascoigne 698
Hunloke v. Gell 515
Hustler, Bird v. 325
Hutchinson, Fermes v. 22

I

Ireland, Churchman v. 950

J

Jeffray v. M'Cabe 739
Johnson v. Telford 244
Jones, Egerton v. 694
——— v. Scott 955

Jones, Tilson v. 553
Joseph & Webster, *in re* 496

K

King of Spain v. Hullet 7n
Kinsman v. Kinsman 617
Knight v. Martin 70

L

Langley, Miles v. 39
Leake v. Nalder 357
Lear v. Leggett 690
Lediard, Sidden v. 110
Lees v. Nuttall 53
Leggett, Lear v. 690
Lewis, Watkins v. 377
Littel, Godfrey v. 59
Livesey v. Harding 636
——— v. Livesey 10
Llantrisant, &c., in the Matter of the Parish of 25
Low, Payne v. 223
Lushington v. Sewell 169
Lynn v. Ashton 188

M

M'Cabe, Jeffray v. 739
Martin, Knight v. 70
Matthews v. Maude 397
Maude, Matthews v. 397
Mayor of Liverpool, Crosbie v. . 761
Mee, Badham v. 631
Mendizabel v. Hullet 324
Miles v. Langley 39
Mills v. Robarts 555
Mill, Portman v. 696
Mollard, Bagley v. 581
Montgomery, Thomas v. . . . 729
Moorhouse, Yarnold v. 364
Munton, Byam v. 503

N

Nalder, Leake v. 357
Naylor v. Arnitt 501
Newbold v. Roadknight 677
Niblock, Garrat v. 629
Norton v. Wood 178
Nuttall, Lees v. 53

O

Oddy, Brough v. 55
Osbourn v. Fallows 741

P

Paice v. Archbishop of Canterbury 759n
Palmer v. Scott 391
Parker v. Fuller 656
———, Propert v. 625
Payne v. Low 223
Pembroke Hall, Attorney General v. . 751
Phillipson, Gibbs v. 19
Pickin, Earle v. 547
Pigot v. Croxall 428n
Plunkett v. Cavendish 713
Ponton v. Dunn 402
Portman v. Mill 696
Potts, Cunningham v. 81
Powell v. Wood 354
Prebble v. Boghurst 744
Pritchard v. Draper 191
Propert v. Parker 625
Pullen, Dalby v. 296

Q

Quayle, Cocker v. 535

R

Rayley v. Best 659
Rees, David v. 687
Reid, Watson v. 236
Reilly, Cooper v. 560
Rich, Burch v. 156
Ridgway, Sumner v. 748
Rigby, Champion v. 539
Roadknight, Newbold v. 677
Robarts, Mills v. 555
Roberts v. Walker 752
Robinson, Stanley v. 527
Rockcliffe, Welby v. 571
Rowlands v. Tucker 635

S

Saberton v. Skeels 587
Scott v. Hauson 128
——, Hoggart v. 293
——, Jones v. 255
——, Palmer v. 391
Sewell, Lushington v. 169
Sheriff v. Coates 159
Sherratt v. Bentley 655
Shewen v. Vanderhorst 347
Shirley, Collins v. 638
Sidden v. Lediard 110
Simond v. Hibbert 719
Skeels, Saberton v. 587
Sladen, Banks v. 216
Smith v. Evans 80
——— v. Campbell 321
Somerville, Greig v. 338
Spicer, Green v. 395
Spray, Burkett v. 113
Spurling, Davis v. 64

Stanley v. Robinson 527
Stratton v. Davidson 484
Sumner v. Ridgway . : . . 748
Sutton v. Sutton 663
Swift, *Ex parte* 575

T

Tadman, Ferguson v. 331
Tanner, Halliwell v. 633
Tarleton v. Dyer 1, 486
Tattersall, Barton v. 237
Taylor, Baily v. . . . , . 73
———, Greenwood v. 185
Taynton, Critchett v. 541
Telford, Johnson v. 244
Tilson v. Jones 553
——— v. Thornton 553
Thomas, Davis v. 506
——— v. Montgomery 729
Thompson, *in re* 355
Thornton, Tilson v. 553
Thurlow, Cunynghame v. . . . 436n
Torres v. Franco 649
Traill, Gedge v. 281n
Townshend, Wickens v. 361
Tucker, Rowlands v. 635
Turner, Watts v. 634
Turnor, Coster v. 311

V

Vanderhorst, Shewen v. 347
Vawdry v. Geddes 203

W

Wagstaff v. Bryan 28
———, Humphreys v. 529
Walker, Roberts v. 752
Walmsley v. Froude 334
Watson v. Reid 336
Watkins, Bowsher v. 277
——— v. Lewis 377
Watson v. Duke of Wellington . . 602
Watts v. Turner 634
Welby v. Rockcliffe 571
Wellington, Duke of, Watson v. . 602
West v. Berney 431
White v. Hall 332
Whitehouse, Fawcett v. , . . 132
Whiting, Cockle v. 43
Wickens v. Townshend . . . 361
Wightwick, Fereday v. . . . 45
Wilson, Barnes v. 1, 486
Wilson v. Halliley 590
Winterton v. Crawfurd . . . 407
Wood, Norton v. 178
——, Powell v. 354
Woodbridge, Hair v. 5a
Woodgate, Bingham v. . . 32, 750

Y

Yarnold v. Moorhouse 364
Young v. Everest 426

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

TARLETON *v.* DYER. BARNES *v.* WILSON.

1829; June 16, 25; July 31.

A second order to amend, obtained by petition of course, is irregular, though obtained before answer.

The acceptance of the 20*s.* costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend obtained as of course.

THE original bill had been filed in 1803, and amended in 1804. In February, 1826, a bill of revivor and supplement was filed by the assignees of one of the original plaintiffs, and the personal representatives of the others. In September, 1826, the defendant Wilson, put in his answer to this bill of revivor and supplement. On the 14th of June, 1828, the plaintiffs obtained an order to amend the bill of revivor and supplement, and in the same month the amendments were made. No answers had been put in to this amended bill, when, on the 23d of February, 1829, another order to amend the bill of supplement and revivor was obtained, under which a re-amended bill of revivor and supplement was filed; and afterwards, on the 6th of June, the plaintiffs again obtained, by *petition at the rolls a common order to amend the bill of revivor and supplement on payment of 20*s.* costs.(*a*) [*2]

A motion was now made on behalf of the defendont Wilson, to discharge the order of the 6th of June.

The objection to the regularity of the order was, that previous orders to amend had been obtained, and that the bill of revivor and supplement had

(*a*) The order was as follows:—

"Upon the humble petition of the plaintiffs in the said supplemental suit this day preferred unto the right honorable the Master of the Rolls, for reasons therein contained, it is ordered, that the petitioners be at liberty to amend their bill of revivor and supplement, as they may be advised, on payment of 20*s.* costs, the petitioners undertaking to amend their said bill of revivor and supplement within three weeks from this time."

been actually amended before the 6th of June; and, therefore, that, according, to the 13th order, no further leave to amend could be obtained, except upon notice.

Mr. *Bickersteth* and Mr. *Lowndes*, for the defendant Wilson.

Mr. *Horne* and Mr. *Spence*, contra, produced the receipt of the defendant's clerk in court for the 20*s*. costs, and contended that the acceptance of the costs was a waiver of any irregularity which might be imputed to the order.

They further contended that the order of the 6th of June, was strictly regular; because the thirteenth order applied only to cases of amendment made after answers had been filed to the bill, as it stood when the [*3] order of amendment was obtained. When the thirteenth *order says, "That the plaintiff shall be at liberty, before filing a replication, to obtain upon motion or petition, without notice, an order for leave to amend the bill, but no further leave to amend shall be granted before replication," except on certain conditions, the plaintiff is supposed to be in a situation to file a replication: and it cannot be doubted that, before appearance, a plaintiff may amend repeatedly under orders of course. He enjoys the same privilege, till the defendants have answered. The object of the new order was, to prevent the delay and vexation of successive amendments; but there can be neither delay nor vexation, when the defendants have not answered; for, by putting in their answers, it is always in their power to deprive the plaintiff of this prerogative. This construction of the order is further fortified by the concluding clause, which directs that no order to amend shall be obtained before replication, unless within six weeks after the last of the answers is to be deemed sufficient. Every part of the order has reference to the amendment of a bill, to which the defendants have filed answers; and it does not apply to the amendment of a record which has not been answered.

Mr. *Bickersteth*, in reply.

The Lord Chancellor:—As to the construction of the thirteenth order, I have no doubt. In the new orders, the filing of the replication is taken as a fixed stage in the progress of the cause; and one course is to be followed before the plaintiff reaches that stage, and a different course afterwards. The fifteenth order lays down the rule as to amendment after replication filed; the thirteenth order applies to the whole course of the cause previous [*4] to the filing of a replication. Any time before replication filed, *the plaintiff may obtain one order to amend; but after he has amended once, he must conform to the regulations prescribed by the thirteenth order, whether answers have been filed or not.[1]

[1] Vide *Mendizabel* v. *Hullett*, post, 324. *Bird* v. *Hustler*, post, 325.

The only doubt I entertain is, whether the acceptance of the costs is a waiver of the irregularity.

June 25.—A similar motion to discharge the order of the 6th of June was made on behalf of other two defendants by the *Solicitor General* and Mr. *Knight.*

A party, they argued, though bound by the acts of his solicitor, was not bound by the acts of a clerk in court, who was not also his solicitor: the solicitor had the conduct of the cause; the clerk in court was a mere formal instrument, who was practically a stranger to the proceedings. The clerk in court, was not bound to know, and, in fact, was not likely to know, whether the order giving leave to amend was regular or not; and there could be no waiver of an irregularity, of which the party had at the time no knowledge. The acceptance of the costs was an act done by the clerk in court of his own accord, without the privity of the defendant or of the defendant's solicitor; it was an act into which he was led by the conduct of the plaintiffs, who obtained an order irregularly, and represented it as regular. A formal act of this kind, done in compliance with the usual routine of the office, could not bind the rights of the client.(*a*)

Besides, the thirteenth order was imperative. The rule was laid down for the general benefit of suitors; and a party could not, by any act of his, give a plaintiff a right to do what the orders of the court had declared the plaintiff should not do.

*Mr. *Spence*, contra, referred to a case of *Hair* v. *Woodbridge*,(*b*) [*5]

(*a*) See *Hughes* v. *Dumbell*, 1 Russell, 317.

(*b*) The following statement of the case of *Hair* v. *Woodbridge* has been communicated to the reporter:—

HAIR v. WOODBRIDGE.

1825; June 17.

The plaintiff having amended the bill, issued an attachment against the defendant for want of answer; and various other proceedings followed upon the attachment, which created considerable expense.

The plaintiff afterwards filed a bill of revivor, from which, and from subsequent inquiries made by the defendant, it appeared that, at the time of the amendment, the suit was abated, and, therefore, that the amendment and all the subsequent proceedings were irregular.

Upon this, the defendant moved to set aside all the proceedings, subsequent to the abatement, for irregularity.

The plaintiff relied on a receipt for the 20*s.* costs given by the agent of the defendant's clerk in court, and dated after the abatement.

The defendant proved by affidavit, that neither his clerk in court nor his solicitor knew of the abatement, till long after the acceptance of the costs.

The motion was refused by Sir John Leach with costs.

On appeal, Lord Eldon also refused the motion with costs; holding, "that all must be taken to have known of the abatement; and that the receipt of costs was a waiver, and so far as the defendant was concerned, cured the defect even of the subsequent proceedings."

Mr. *Hart*, for the defendant.

Mr. *Barber*, for the plaintiff.

decided by Lord Eldon in 1825. If a party was to be bound by the acts of his solicitor, still more reasonable was it that he should be bound by the acts of his clerk in court; for not only was the latter [*6] *bound to know, but he was the person who had the best means of knowing all the previous proceedings in the cause.

The motion stood over, in order that a certificate might be obtained from some of the most experienced clerks in court, with respect to the effect of the acceptance of the 20*s.* costs as a waiver.

The following certificate was returned :—" We, the undersigned clerks in court, humbly certify to your Lordship, that we are of opinion, that, in a general view, by accepting the costs under an order for amending a bill, the clerk in court binds his client against objecting to the order for irregularity. Yet we trust that the court will in all cases be guided by the circumstances under which such costs have been accepted, before it precludes the defendant from objecting to the irregularity of the order. We are not aware that any case has been reported upon the point.

(Signed)

" Thomas Smith.	John Baines,
" S. Sandys.	Geo. Jackson.
" C. Blandy.	Richard Mills.
" Geo. Gatty.	S. H. Lewin.
" Joseph Bicknell.	W. E. M. Sherwood."

July 31.—The Lord Chancellor :—The question is, whether the irregularity of the order to amend has been waived by the clerk in court's acceptance of the costs. (*a*)

(*a*) A similar question arose before the Vice-Chancellor in

The King of Spain v. Hullett.

1830; February 4.

It is irregular to obtain an order to amend, when more than six weeks have elapsed from the time when the answer of all the defendants, who are stated to be within the jurisdiction, is to be deemed sufficient, though no answer has been filed by another person, alleged to be out of the jurisdiction, against whom process is prayed, when he shall come within the jurisdiction.

In that case Justo de Machado was stated by the bill to be resident out of the jurisdiction, and process was prayed against him, when he should come within the jurisdiction. He had never appeared. The only other persons against whom process was prayed, were the defendants Hullett and Widder; and they had answered in July, 1828.

On the 18th of January, 1830, the following order to amend was obtained as of course.

" Between the king of Spain, plaintiff; and John Hullett, Charles Widder, and another, defendants.

" Upon motion, &c. it was alleged, that the plaintiff having exhibited his bill in this court against the defendants, the above-named defendants put in their answer on the 10th day of July, 1828; that the plaintiff has not filed a replication, and is since advised to amend his bill, and the defendant, Justo de Machado, has not yet put in his answer thereto, and in regard the plaintiff has not

*The clerk in court and the solicitor are identified; the acceptance of [*7] the costs by the former is the same as acceptance by the latter. It is said, that, in this particular case, the clerk in court had no knowledge of the previous proceedings. But he either knew or ought to *have [*8] known, that there had been a previous amendment; and, besides, he not only accepted the costs, but retained them till the time of the motion.

*It was suggested that the thirteenth order could not be waived. [*9] That is a misapprehension. The parties may consent to permit an amendment, which is not conformable to the orders of the court.

Motion refused.[1]

obtained any order for liberty to amend his bill, it was therefore prayed, that the plaintiff may be at liberty to amend his bill, as he shall be advised, upon payment of 20*s.* costs to the defendants John Hullett and Charles Widder, and without costs as to the defendant Justo de Machado, amending his office copy thereof, and which is ordered accordingly, the plaintiff undertaking to amend his bill within three weeks from this time.

Mr. *Pepys* and Mr *J. Russell*, for the defendants Hullett and Widder, moved to discharge this order for irregularity, on the ground that it had not been obtained within six weeks after the answer of the only persons, who were made defendants effectually, was to be deemed sufficient.(*) The allegation, that there was a defendant who had not put in his answer, was an evasion of the rule; for a person, who was stated to be out of the jurisdiction and who had not appeared, could not be considered a defendant within the meaning of the thirteenth order.

Sir Charles Wetherell and Mr. *Wheatley*, contra, insisted, that Machado was a defendant within the meaning of the last clause of the thirteenth order, and that, so long as he had not answered, the plaintiff was at liberty to amend.

The Vice-Chancellor discharged the order as irregular.

The clerk in court of the defendants Hullett and Widder had accepted the 20*s.* costs; but, in the argument, no allusion was made to that circumstance on either side.

March 8.—Before the order of the Vice-Chancellor, discharging the order of the 18th of January was drawn up, the solicitor of the plaintiff sent an intimation to the solicitor of the defendants that he intended to move that the order of the Vice-Chancellor might be discharged; and accordingly, after the order had been passed and entered, a motion to discharge it was made on behalf of the plaintiff. The ground of the motion was, that the acceptance of the 20*s.* costs was a waiver of the irregularity; and the decision of the Lord Chancellor in *Tarleton* v. *Dyer* was referred to.

On the other hand it was argued, that the plaintiff, having omitted to take advantage of the alleged waiver on the hearing of the motion, could not avail himself of it now; and that the present case was distinguishable from that of *Tarleton* v. *Dyer*, inasmuch as the order of the 18th of January contained allegations which were not true in point of fact.

The Vice-Chancellor was of opinion that the case came within the principle of *Tarleton* v. *Dyer*, and discharged his former order, but directed the plaintiff to pay to the defendants the costs of the application.

(*) "No order to amend shall be made before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers, if there be two or more defendants, is to be deemed sufficient." Order XIII.

[1] Vide *Boswell* v. *Tucker*, 1 Keen, 188. *Traile* v. *Bull*, 1 Beav. 475..

[*10] **Between* JAMES WORTHINGTON LIVESEY AND MARY CARTER LIVESEY, AND HARDING LIVESEY, INFANTS, BY JAMES WORTHINGTON LIVESEY, THEIR BROTHER AND NEXT FRIEND, *Plaintiffs; and* MARTIN LIVESEY, AND JANE HIS WIFE, JOHN ARMSTRONG, ELIZA LIVESEY, EDMUND WORTHINGTON LIVESEY, AND OTHERS, *Defendants.*

1829; November 3.

By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents: after the sister had attained her full age, D. died, having appointed her his executrix: A. gave notice to the persons, who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them.

The sister filed a bill of revivor after the death of D., and made A. and his infant brother defendants: A. and the brother, after notice of that bill, filed another bill of revivor: this second bill was ordered to be taken off the file; and the court held, that an alleged defect of parties in the frame of the first bill of revivor afforded no reason for allowing the second bill of revivor to remain on the file.

THE suit was instituted in 1822, for the administration of the assets of Dr. Worthington, the grand father of the plaintiffs.(*a*) Their elder brother, the defendant Edmund W. Livesey, a solicitor at Liverpool, had a considerable interest under the grand father's will, adverse to theirs; and Ellis & Co., his agents in London, had conducted the suit on his part and that of the plaintiffs. Mary Carter Livesey, one of the infant plaintiffs, attained her full age in July, 1825. In May, 1827, E. W. Livesey died; and the adverse interest, which had been in him, became vested in Mary Carter Livesey, as his executrix and residuary legatee. Shortly afterwards, James Worthington Livesey, who was the sole adult plaintiff at the institution of the suit, gave notice to Ellis & Co. not *to take any proceedings in his name; and, at the same time, Mary Carter Livesey retained them as her solicitors.

[*11]

On the motion of James Worthington Livesey, the Vice-Chancellor had made an order that Ellis & Co. should deliver up the papers to him on the payment of what, on taxation, should be found due to them in respect of the costs of the suit.

Mary Carter Livesey now moved that the order might be discharged.

It appeared, by the affidavit of James Worthington Livesey, that, originally, he had given authority to his brother E. W. Livesey, as his solicitor, to institute the suit, and conduct it. But, in the course of the proceedings, Ellis & Co. communicated immediately with James Worthington Livesey, and received instructions and directions from him personally. They alleged, that, on those occasions, they considered him as the agent of his brother Edmund.

*See *Livesey* v. *Livesey*, 3 Russell, 287.

Mr. *Bickersteth* and Mr. *Knight*, in support of the motion. In point of fact, Ellis & Co. never were the solicitor of the plaintiffs, but were merely the town agents, of E. W. Livesey the actual solicitor of the parties; and, consequently, the order is erroneous, since it treats them not as agents, but as solicitors. The papers being in their hands as the agents of E. W. Livesey, what right can one or two out of three plaintiffs have to call for a delivery of the papers?—especially when the executrix of the solicitor, whose agents Ellis & Co. were, requires them to retain those papers. It is alleged, that a large balance is due to Ellis & Co. from E. W. Livesey, *exclusive of the costs of the suit; and Mary Carter Livesey swears [*12] that she believes that James Worthington Livesey is indebted to the estate of his deceased brother. These papers, therefore, may be subject to a lien far beyond the unsatisfied costs of the suit.

The *Solicitor General* and Mr. *J. Russell*, contra:—Sometimes Ellis & Co. seem to have considered themselves merely as agents; and at other times, they have unquestionably acted as the solicitors of the plaintiffs; but, by the law of the court, they must be considered as solicitors and not as agents. They were acting for plaintiffs, of whom two were infants. Edmund, the alleged solicitor, was a defendant, having an interest adverse to that of his younger brothers and sisters. Ellis & Co. must have know from the pleadings in the cause, and they are expressly apprised by letters set forth in the affidavits, that E. W. Livesey had a material interest hostile to that of the infants; and officers of the court, who *de facto* do all that solicitors would do for infant plaintiffs, (and it is not shown that Edmund did any part of the duty of a solicitor,) will not be permitted to say, "We have not been the solicitors of these infants; we were only the agents of a defendant having an interest adverse to theirs, and that defendant was their solicitor."

A defendant, having an interest adverse to infant plaintiffs, cannot be the solicitor, by whose acts, as solicitor, those plaintiffs are to be bound; if he is not the solicitor of all, he is not the solicitor of any. It would be of dangerous consequence, if, in family suits, such as this is, officers of the court, acting as Ellis & Co. have acted here, should not be regarded as being *de facto* the solicitors of the plaintiffs, on whose behalf they have conducted the suit.

*But suppose Ellis & Co. to have been, not the solicitors of the [*13] plaintiffs, but merely the agents of the solicitor, they have no right to retain the papers. The solicitor is now dead; the clients have a right to the possession of the papers; and if Ellis & Co. insist on a lien for costs, those costs must be taxed, in order that the amount of the lien may be ascertained. If it be suggested that Mary Carter Livesey, as the executrix of the deceased solicitor, has a lien on the papers for a balance due to that solicitor, we are willing to satisfy that lien. The lien of the agent, as against the client, may extend to less, but cannot extend to more, than the lien of the solicitor; and we offer to satisfy that lien, estimated in either way.

The suit was originally instituted by the direction of James Worthington

Livesey, and he, as the sole adult plaintiff, was alone answerable, and still is answerable, for the costs. The papers must have come into the hands of the solicitor, or the solicitor's agents, as acting for James Worthington Livesey: and, the day before Mary Carter Livesey came of age, it is clear that James Worthington Livesey, upon his satisfying the solicitor's lien, might at any time have required the papers to be delivered to him. What has since happened to deprive him of that right? Had Mary Carter Livesey, when she came of age, insisted on having the papers delivered over to her, and on having the conduct of the suit, she could not have succeeded; if she was dissatisfied with the proceedings, she might have applied to have her name struck out, and to be made a defendant; but she could have done nothing more. Can she, by acquiescing in the proceedings for some time, acquire a greater right against her co-plaintiffs, than if she had claimed the conduct of the suit as soon as she came of age?

[*14] *Ellis & Co. have no right to the possession of the papers; and their possession must be considered as the possession of Mary Carter Livesey, considered either as the executrix of the deceased solicitor, or as having been originally a co-plaintiff. As representing the deceased solicitor, her right can only be to have his lien satisfied; as having been originally an infant plaintiff, her rights cannot extend to more than to have the inspection and use of the papers in matters connected with the interest in respect of which she was made a co-plaintiff. The papers must be delivered to one of the two contending parties: and the question is, which has the better right to appoint a solicitor instead of the solicitor who is dead, and to have the conduct of the suit? Two out of three co-plaintiffs,—one of these two having been originally the sole adult plaintiff, and the next friend of the other two,—must prevail over the pretensions of the third co-plaintiff. On general grounds, the majority of plaintiffs, including the person who originally authorized the institution of the suit, and was responsible for the costs, and retained the solicitor, are entitled to a preference over one single co-plaintiff, who was originally a party by one of that majority as her next friend; and, in the present case, these grounds derive additional strength from the circumstance, that this lady, by having acquired the adverse interest of a deceased defendant, is herself to be considered as substantially a defendant to the suit; so that, even if she were willing to concur with her brothers in the prosecution of the suit, it would be improper to permit her to continue to fill the character of a plaintiff.

Mr. *Bickersteth*, in reply:—The motion relates, not to the conduct of the suit, but to the possession of the papers. We do not say

[*15] *that we are entitled to have the conduct of the suit, or to have the exclusive possession of the papers; we merely contend that the papers are not to be taken out of the hands of Ellis & Co., in order to be placed in the hands of a solicitor appointed by James Worthington Livesey.

The Lord Chancellor:—I consider E. W. Livesey as having been in

point of fact the solicitor of the plaintiffs; and the propriety of his appointment does not come into question for the purposes of this motion. Whatever impropriety there might be in the appointment, it was the act of James Worthington Livesey. Ellis & Co. were the agents of E. W. Livesey: and these papers came into their possession as his agents. They are, therefore, held by them for the benefit of all the clients; and one or two of the plaintiffs are not entitled to demand the delivery of them, without the concurrence of the third. Let the order of the Vice-Chancellor be discharged.

A similar order for the delivery of papers had been made by the Vice-Chancellor in a cause for the administration of the grand mother's estate, in which there was another adult plaintiff, who supported the application of James Worthington Livesey; so that a greater proportion of the whole interest, represented by all the plaintiffs, was there opposed to Mary Carter Livesey, than in the suit relating to the grand father's property. The Lord Chancellor discharged that order likewise.

The will of E. W. Livesey, being contested in the ecclesiastical court, was not proved till June, 1828; and shortly afterwards, Mary Carter Livesey filed a bill *of revivor. The defendants to it were her two [*16] brothers, who had previously been co-plaintiffs with her, and all the persons who had been defendants to the original bill, except John Armstrong, the surviving trustee under the testator's will. The original decree directed an account against him; but the bill of revivor alleged that he was dead, and had not possessed himself of any part of the trust property. On the 29th of July, James Worthington Livesey appeared to this bill; and, on the 6th of August, he and his infant brother, after a previous application to Mary Carter Livesey not to proceed in reviving a suit which she had no right to prosecute, and which they meant to carry on with due diligence, filed a bill of revivor, stating that she had acquired an interest adverse to theirs, and neither would nor could any longer concur with them as co-plaintiffs. The defendants to this bill were Mary Carter Livesey, such of the parties defendants to the original bill as were living, and the real and personal representatives of Armstrong.

On the 26th of August, Mary Carter Livesey obtained an order of revivor on her bill; and, on the following day, her two brothers obtained an order to revive in their suit.

With the motion relating to the custody of the papers, there was combined an application on the part of Mary Carter Livesey, that the bill of revivor filed by James Worthington Livesey and Harding Livesey might be taken off the file for irregularity, and that the order of revivor obtained by them might be discharged.

In support of the application it was said, that Mary Carter Livesey had obtained priority of suit, and that James Worthington Livesey and his in-

fant brother, having appeared to her bill, and having notice of her
[*17] *proceedings, were not entitled to file another bill of revivor, which was altogether unnecessary.

On the other side it was contended, that, though, after a decree, any party had a right to revive, yet a defendant could not make herself plaintiff in a bill of revivor, and convert the original plaintiffs into defendants, unless those plaintiffs omitted or refused to revive the suit with due diligence; and, in like manner, one of several plaintiffs had no right to convert the co-plaintiffs into defendants, unless they refused to be themselves active in remedying the abatement.(a) Mary Carter Livesey, as one of several co-plaintiffs, was guilty of irregularity in taking upon herself to file a bill of revivor; the irregularity was the greater, because she was originally an infant co-plaintiff, having no share in the conduct of the suit, and incurring no liability in respect of it; and if it were said, that, as she had acquired an interest adverse to her brothers, she could no longer be a co-plaintiff with them, the answer was, that the acquisition of the interest of a deceased defendant must be considered as placing her in the situation of that defendant, so as to exclude her from the right of reviving the suit, until the other plaintiffs were chargeable with negligence and delay. But even if she had the same right to file a bill of revivor as her brothers, her bill was defective; and the court would not order a proper bill of revivor to be taken off the file, because another party had chosen to file an improper bill. The decree had directed accounts against Armstrong, which had not been taken; and as he was the surviving
[*18] trustee, *the legal interest in the trust property had become vested in his representatives. His real and personal representatives were, therefore, necessary parties to the suit; and, under the order of revivor obtained by Mary Carter Livesey, the decree could not be prosecuted with effect. She alleged indeed, in her bill of revivor, that Armstrong did not possess himself of any part of the trust property: but the original decree, directing an account, showed that that allegation could not be true, unless the decree were erroneous; and the mere allegation of Mary Carter Livesey could not deprive the other parties of their right to an account, which the decree had directed. Even if such an allegation were to destroy the right to an account, it could not cure the defect arising from the want of any representative of the surviving trustee. Such imperfections in the frame of Mary Carter Livesey's suit were a sufficient ground for refusing the motion, or at least for a reference to the master to inquire, which suit of revivor ought to be permitted to go on.

It was stated in reply, that the rule, which prohibited one of several plaintiffs from alone filing a bill of revivor, unless his co-plaintiffs refused to concur with him, did not apply to the present case; because it was clear from the previous conduct of the parties, as well as from the nature of the interest

(a) "It was likewise held, that, if some of the plaintiffs refused to join in bringing a bill of revivor, the others may bring such bill, and make those who refused defendants." 1 Eq. Abr. 2.

which Mary Carter Livesey acquired on the death of Edmund, that she and her brothers could not continue co-plaintiffs. As to the alleged imperfection of her bill of revivor, the court could not enter into the consideration of that topic. If that bill were defective, the defect could be cured by amendment.

THE LORD CHANCELLOR held, that, Mary Carter Livesey's bill having been first filed, James Worthington Livesey had no right to file another bill of revivor; and *that the court would not inquire, in this stage of the [*19] proceedings, whether the first bill was or was not defective; for any defect in it might be cured hereafter.[1]

The order to take the bill of revivor off the file, and to discharge the order of revivor, was made without costs.[2]

GIBBS *v.* PHILLIPSON.

1829; November 4.

A person, who is served with a *subpœna ad testificandum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the subpœna and the day appointed for his examination.

Semble, a witness, who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bona fide* for the purpose of giving evidence.

A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately.

THIS was the petition of the plaintiffs and of James Randolph, described as of the city of Bath, praying that Randolph might be discharged out of custody.

It stated, that, on the 12th of September, a subpœna to testify had been served on Randolph in London; that Randolph being informed that, in consequence of the state of business in the examiner's office, his attendance would not be required till after the 6th of October, went into Cambridgeshire, but on the fifth of October, returned to London, for the express purpose of obeying the subpœna; that, finally, the 22d of October, was fixed for his examination, and he was served with a notice to that effect under the hand of the examiner; that on the 19th of October, Randolph being then in London for the express purpose of giving evidence in obedience to the subpœna, was arrested under a warrant granted by the sheriff on a writ of *capias ad satisfaciendum*, while he was on his way to the office of the plaintiff's solicitor, "for the purpose *of looking into the draft of the interroga- [*20]

[1] Vide *Phillips* v. *Clark*, 7 Sim. 231.

[2] Vide *Partridge* v. *Usborne*, 4 Russ. 195, 253, and notes, ibid.

tories exhibited for his examination, in order to prepare himself to speak with certainty as to the matters required to be elicited."

There was an affidavit to the same effect.(*a*)

The solicitor of the creditor, at whose suit the arrest had taken place, swore, that Randolph, to avoid his creditors, quitted Bath, in 1827; that, since the commencement of 1826, he had frequently seen him in London; that he believed that Randolph had been resident in London since 1827, and that the allegations, that he had come to London and remained there for the purpose of obeying the subpœna and giving evidence, were delusive.

The Solicitor General, for the petition:—The subpœna in chancery does not fix the day on which the witness is to attend to be examined; but when once a day is appointed, he is informed of it by a note under the hand of the examiner, and he is bound to attend on that day. Randolph was arrested not only after he had been served with the subpœna, but after he had received the note of the examiner, fixing the 22d of October, and while he was on his way to do an act preparatory to his examination. He is entitled to be discharged, both because his arrest was within the time to which his protection would extend, and because it took place while he was engaged in an act connected with his obedience to the subpœna.

Mr. *Pepys*, contra.

[*21] *The Lord Chancellor:—In September, Randolph was served with a subpœna in London, where, I must assume, his residence at that time was. Being afterwards informed that his examination would not take place for some time, he went into Cambridgeshire; and thence he returned to London—not to a strange place, but to the place where he had been served with the subpœna; and, finally, he was informed that his examination would take place on the 22d of October. Under these circumstances, he could not be protected, on the 19th, by the subpœna and the notice for his examination on the 22d.

He next says, that he ought to be protected, because, when he was arrested, he was on his way to the solicitor's office for the purpose of looking at the draft of the interrogatories. It has never been decided that a witness is entitled to protection under such circumstances; and, on the same principle on which this application proceeds, a person might claim protection, while going to the solicitor of one of the parties to an action, in order to be examined, preparatory to his giving evidence in a court of law. There is no case which would justify me in saying, that a person is protected in going to the solicitor's office to look at the interrogatories, as preparatory to his examination as a witness.

Had Randolph come from the country for the purpose of being examined,

(*a*) Randolph had applied to Lord Tenterden to be discharged; but his Lordship refused the application.

he would have been protected during the whole time of his remaining here *bona fide* for the purpose of giving his testimony.[1]

The petition was dismissed with costs.

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*Fernes *v.* Hutchinson. [*22]

1829; November 4, December 9.

If a defendant, who is in a situation to dismiss a bill by an order of course for want of prosecution, after replication filed, does not avail himself of his rights, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal, subsequently obtained, will be discharged for irregularity.

The plaintiff, without having been served with notice of a motion to dismiss the bill for want of prosecution, filed a replication to the answer of the defendant, and served a subpœna to rejoin on the 6th of May: so that, according to the seventeenth order, he ought to have given rules to produce witnesses, and ought to have passed publication, in Trinity term following; and, upon his default in so doing, the defendant was at liberty to have dismissed his bill with costs. Trinity term ended on the 8th of July; and nothing was done by either plaintiff or defendant till the 14th of July, when the plaintiff filed interrogatories in the examiner's office. On the 22d of that month, he proceeded to examine two witnesses, after the usual notice to the clerk in court of the defendant; and he was proceeding to examine other witnesses, when the defendant presented a petition of course at the rolls, stating that the plaintiff had filed a replication, and served a subpœna to rejoin, returnable on the 6th of May, and that no proceedings had been since taken. On that petition the usual order was made, that the bill should stand dismissed with costs.

The plaintiff now moved to discharge the order for irregularity.

The *Solicitor General*, for the motion:—The plaintiff, if he did not avail himself of his power to dismiss the bill before the defendant had taken any further proceedings, could not exercise it subsequently. By remaining passive, and not obtaining the order of *dismissal immediately after [*23] the expiration of Trinity term, he induced the plaintiff to incur the expense of filing interrogatories, and of bringing up his witnesses and examining them. He has acquiesced in the proceedings, and cannot now obtain an order which will annihilate them; he has waived the right to dismiss, which he once possessed, and cannot now recall it. The defendant, who means to dismiss a bill for want of due diligence on the part of the plaintiff,

[1] Vide *Norris* v. *Beach*, 2 Johns. Rep. 294. *Bowes* v. *Tuckerman*, 7 Johns. Rep. 338. *Sandford* v. *Chace*, 3 Cow. 381. *Snelling* v. *Watrous*, 2 Paige, 314. 1 Dunl. Pract. 100.

must himself be diligent in the exercise of that strict right. *Anonymous case.*(a)

Mr. *Horne*, contra:—The seventeenth order does not limit any time within which the application to dismiss the bill must be made; the plaintiff, by not proceeding with the cause, put the defendant in a situation to dismiss it; and how can he, by any act of his own, deprive the defendant of the power so acquired? The defendant has not concurred in any of the proceedings of the plaintiff; he has done nothing to induce the plaintiff to believe that he meant to waive any of his rights; whatever proceedings the plaintiff has taken, have been taken at his own risk. If the court should be of opinion that the bill ought to be restored, it must be as an indulgence to the plaintiff, and he must pay the costs.

December 9.—The Lord Chancellor:—Under the seventeenth order, the plaintiff was bound to give rules to produce witnesses and pass publication in Trinity term. The term ended on the 8th of July; witnesses had
[*24] not then been produced, nor had *publication passed; and the defendant was therefore entitled to have dismissed the bill with costs, by an order of course. The defendant, however, did nothing. On the 14th of July, the plaintiff filed his interrogatories in the examiner's office; on the 22d of July, he examined two witnesses, after the usual notice to the defendant's clerk in court: and he was proceeding to examine his third witness, when, on the 24th of July, the defendant obtained the usual order, dismissing the bill for want of prosecution, with costs. The question is, was he entitled to obtain this order?

I am of opinion, that, under these circumstances, the defendant was not entitled to obtain an order of dismissal. He was entitled to have dismissed the bill at the end of the term, and within a convenient time afterwards: he did not avail himself of this right; and the plaintiff might fairly consider that he did not mean to dismiss the bill. The plaintiff then takes a step, of which he gives notice to the defendant, and is allowed to go on. The defendant having lain by during the whole of this time, and having had distinct notice that the plaintiff was proceeding in the suit, was not entitled afterwards to dismiss the bill by a common order.

The order was discharged with costs.[1]

(a) 14 Ves. 492.

[1] Vide *White* v. *Smith*, 1 Keen, 381. *Strickland* v. *Strickland*, Cr. & Ph. 151. See further, as to waiver by taking or permitting subsequent steps in a cause, *Pitchard* v. *Draper*, post, 191, 198. *Peasnall* v. *Coultart*, 1 Keen, 184. *Lincoln* v. *Wright*, 4 Beav. 172. *Hay* v. *Power*, 2 Edw. Ch. Rep. 494.

*IN THE MATTER OF THE SEVERAL PARISHES OF LLANTRISANT, &c. [*25]

1829; November 7, 28.

The sixtieth of the new orders extends to the production of books and papers under orders or decrees made before the date of the new orders.

The master is to exercise the discretion given him by the sixtieth order, to determine what books or papers shall be produced, though the order or decree, under which he is proceeding, requires the parties to produce, on oath, *all* books and papers.

THE petition related to the administration of a charity. By an order of the Master of the Rolls, dated the 5th of November, 1827, various accounts and inquiries were directed, with the usual clause requiring the parties to produce before the master upon oath all deeds, books, papers, and writings in their custody or power, relating to the charity.

Under this order the feoffees of the charity lands carried in two states of facts; and, in proceeding on these states of facts, such of the deeds, books, maps, and surveys, as were then considered necessary, or were required by the other party, were from time to time produced. Afterwards the petitioners obtained a warrant, requiring the feoffees to bring into the master's office all deeds, maps, papers, and writings relating to the charity estates. The feoffees submitted to the master, that many of the maps and deeds were mere evidences of title to the charity lands, and could be of no use in prosecuting the inquiries and accounts directed by the order; and they contended, that, according to the sixtieth of the new orders,(a) he ought to exercise his discretion *in determining what books, papers, or writings should be [*26] produced. The master refused to exercise such a discretion, and on the 4th of December granted his certificate, that they "had not brought in before him upon oath the several deeds, books, papers, and writings, in their custody or power relating to the charity, although they had been duly summoned so to do." Upon this certificate the usual four day order was obtained.

The feoffees moved before the Lord Chancellor, that the order of the 4th of December might be discharged, or that it might be referred to the master to inquire and certify what deeds, maps, books, papers, and writings were proper or necessary to be produced before him for the purposes of the order of the 5th of November, 1827, and when and for how long a time they were to be left in his office; and that, in the mean time, the proceedings under the order of the 4th of December, 1828, might be stayed.

(a) "That, where, by any decree or order of the court, books, papers, or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when, and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers or writings should be left or depesited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient."

Mr. *Cockerell*, in support of the motion.
Mr. *Wyatt*, contra.

November 28.—THE LORD CHANCELLOR:—By the original order, made in November, 1827, the parties were required to produce before the master all deeds, books, papers, and writings connected with the charity, which was the subject of the petition. In November, 1828, the master issued his warrant, requiring the trustees of the charity to bring into his office all deeds and papers relating to the charity estates. The parties afterwards attended before him, when it was urged on behalf of the trustees, that the master [*27] should *exercise his discretion, according to the sixtieth of the new orders, in determining what books and papers should be produced before him, and how long they should be left in his office. The master was of opinion that he could exercise no discretion on the subject, and that he could only certify that the warrant had not been complied with. On the 4th of December, 1828, he granted his certificate of default; and, on the same day, the usual order was obtained from the court.

I have seen the master. It seems to have been his opinion, that, as the original order, requiring the production of the papers, bore date before the issuing of the new orders, it was doubtful whether the sixtieth order was applicable to such a case; and futher, as the original order pronounced by the Master of the Rolls directed that *all* papers should be produced on oath, he doubted whether he had any discretion to decide that some of them should not be produced.

My opinion is, that the sixtieth order applies to decrees and orders made before, as well as to those made after, the date of the new orders; and I do not think that there is any necessity for altering the usual language of decrees and orders, which extends to all books, papers, and writings; but that, the terms of that particular decree or order being general and most comprehensive, the master is, nevertheless, to exercise the discretion given him by the sixtieth order.

The order of the 4th of December must, therefore, be suspended; and it must be referred to the master to determine what books and papers are to be produced, and how long they are to remain in his office.[1]

[1] That an order requiring the production of books, &c., before a master implies also an authority in the master to require the books, &c., to be left with him; see *Shirley* v. *Earl Ferrers*, 1 Myl. & Cr. 304.

*Wagstaff v. Bryan. [*28]

Rolls.—1829; November 9.

Statements in an answer are impertinent, if they are neither called for by the bill nor material to the defence, with reference to the order or decree which may be made on the bill.

Statements in an answer to a bill of revivor, which merely show irregularity and misconduct in the former proceedings in the suit, are impertinent.

Form of exceptions for impertinence under the new orders.

An exception for impertinence fails, if any part of the passage included in it be not impertinent.

The bill in this case was merely a bill of revivor, though some of the allegations, introducing matter which was only matter of revivor, were stated by way of supplement. In the answer, a detailed account of the proceedings which had taken place in the suit, and which were referred to in the bill, was introduced, for the purpose of objecting to them as irregular and oppressive; and it was insisted that some of the orders, which had been made in the cause, ought to be set aside, and that money, which had been paid out of court under them, ought to be brought back. One continuous portion of this statement extended to upwards of ninety folios. On a reference for impertinence, the master had reported that the answer was not impertinent; and to his report the plaintiff took exceptions.

Mr. *G. Richards*, in support of the exceptions, contended, that long and prolix statements of the former proceedings in an answer to a bill of revivor, were altogether irrelevant. If the defendant wished to complain of the former proceedings, he ought to have preferred his complaint by a motion or a petition.

Mr. *Kindersley*, contra, contended, that the party had a right to place on the record his protest against the course of procedure which the plaintiff had adopted; and more especially, as he would have a right to read his answer on the question of costs.

The Master of the Rolls:—The question is, whether long statements, introduced for the purpose of showing that there has been *irregularity and misconduct in the proceedings of the plaintiff, are impertinent, because the defendant can have no advantage of them with reference to the order of revivor, which is the only order that can be made on this bill. In my opinion, it would lead to great oppression, if a defendant were at liberty to introduce into his answer matter of which he can have no advantage, with reference to the proceeding which he is called on to answer. [*29]

It is said, that, on the question of costs, the defendant might have the benefit of this answer; as he would then have a right to have it read, and these statements would show the injustice and irregularity of the plaintiff's conduct. But the court, if, in considering the question of costs, these statements were pressed on its attention, would say, that it is not in this mode that proceedings in a suit ought to be complained of; that, if proceedings are irregular or oppressive, parties must take the proper course to remove the irregularity or

remedy the oppression; and that a judge will not suppose that proceedings have been irregular or oppressive, if the proper course to complain of them has not been taken.

The principle, on which I proceed, is, that nothing ought to remain in the answer, except that which is called for by the bill, or would be material to the defence, with reference to the order or decree which may be made on the bill. This answer, therefore, is impertinent, in so far as it brings forward a case, which can have no effect upon the order of revivor.[1]

Another answer to the same bill had been referred for impertinence [*30] on the same ground, after the new *orders had come into operation; and, pursuant to the sixth of those orders, exceptions had been filed, describing the particular passages which were considered to be impertinent. Each exception included a great portion of the answer, and described that portion as extending from a specified word in a specified folio, to another specified word in another specified folio.

Mr. *Kindersley* objected that the exceptions were bad in form. Each allegation, he said, ought to have been the subject of a separate exception, as each interrogatory must be made the subject of a separate exception, where the answer is complained of for insufficiency; and each exception ought to have stated the matter complained of as impertinent.

The Master of the Rolls held, that the exceptions were right in point of form. The only object of the sixth order was, to inform the defendant

[1] In the answer to a bill of revivor, and to prosecute the decree made in the former suit, a defendant is not entitled to resist the plaintiff's right to revive and prosecute the decree, by stating matter which existed at the time of the decree, or which has arisen since; and such matter, if stated, is impertinent. "If," said Lord Cottenham, "the proper time for making the defence has been permitted to pass, the omission cannot be supplied in this manner, and if new matter has arisen varying the situation of the parties, other means exist of bringing it forward; but the right of a party to prosecute the decree, and therefore to do what is necessary for that purpose, cannot depend upon the merits of the decree." *Devaynes* v. *Morris*, 1 Myl. & Cr. 213. But it has been held not to be impertinent for defendants to state in their answer to a bill of revivor, that they had become certificated bankrupts. "These defendants, by their answer, do represent, what they had a right to represent, namely, that the plaintiffs cannot have a decree against them in the same form, as it might have been made at the time when they put in their answers to the original bill. And though it is true that the objection might have been stated at the bar, at the hearing; yet I think that it is by no means incumbent on defendants who are called on to answer a bill of revivor, to omit any facts which materially concern the decree. In my opinion, the defendants to such a bill, in case they are required to answer it, have the same right, as all other defendants have, that is, to state in their answer, such facts as are favorable to them, as showing that the same decree as might have been originally made, cannot be obtained against them; notwithstanding these facts do not tend to show that the plaintiffs are not entitled to revive the suit." Shadwell V. C., *Langley* v. *Fisher*, 10 Sim. 345. A defendant cannot set up in his answer to a bill of revivor, matter of defence which had been admitted by the answer of a former defendant, to whose rights he had succeeded. So, an heir at law in his answer to a bill to establish a will, admitted that the will was well executed, and the sanity of this testator. The heir died and the bill was revived against his heir at law, who disputed the execution of the will and the sanity of the testator: it was held that the court would not allow him to do so. *Livesey* v. *Harding*, Taml. 460.

what particular parts of the answer were complained of as impertinent; and that information was given him with sufficient certainity by this mode of excepting.

The greater part of the matter included in each exception was impertinent, according to the principle laid down by the Master of the Rolls in deciding on the answer, which had been the subject of the first reference: but, with respect to the answer which had been referred under the new orders, Mr. *Kindersley* submitted, that the plaintiff was bound to make out that the whole of the passage contained in each exception was impertinent, and that, if any part of it, however short, could be shown to be not impertinent, the whole of that exception must fail.

Mr. *G. Richards*, on the other hand, contended, that, if part of [*31] the matter included in one exception was impertinent and part of it not impertinent, the court would allow the exception as to so much of the matter as was impertinent, and disallowed it as to the rest. Such had hitherto been the usual course of the masters in proceedings on exceptions for impertinence; and it was analogous to the mode of proceeding on exceptions for insufficiency. A different rule would force a party to make each separate allegation the subject of a separate exception, which would occasion great prolixity and expense.

The Master of the Rolls held, that each exception must be supported *in toto*, or must fail all together; that the exception must be overruled, if it included any one passage which was not impertinent: and that the sixth order might be completely evaded, if a different rule were adopted; because a party would then be left at liberty to file sweeping general exceptions, and take the chance of succeeding on some small portion of a vast mass of matter.

The defendant succeeded in showing that each exception included some passage which was not impertinent; and the exceptions were disallowed.[1]

[1] That an exception covering too much will be overruled, see further *Pearson* v. *Knapp*, 1 Myl. & K. 312. *Byde* v. *Masterman*, Cr. & Ph. 265. *Tench* v. *Cheese*, 1 Beav. 571. *Woods* v. *Woods*, 10 Sim. 197, the duty of the master on a reference for impertinence, is thus stated by Wigram, V. C. "The duty of the master upon a reference for impertinence, is in the first place, to inform himself of the scope of the bill, in order that he may see what decree, according to the scope of the bill, the court may make at the hearing;—not what decree in his jugdment the court ought to make. If the matter be pertinent according to any decree that may be made within the scope of the bill, it cannot be held impertinent. If, according to the scope of the bill, the matter cannot be material or relevant, then it is impertinent." *Attorney General* v. *Foster*, 2 Hare, 89.

[*32] *BINGHAM *v.* WOODGATE.[1]

ROLLS.—1829; November 10, 17.

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir.

Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord.

UNDER family settlements, John Lord Muncaster was tenant for life of the manor of Muncaster, remainder to his first and other sons in tail male; remainder to his brother Lowther for life; remainder to the first and other sons of Lowther in tail male. John Lord Muncaster, at three different times, purchased of tenants of the manor certain customary tenements, which were conveyed to him and his heirs. On each of these three occasions, the vendor conveyed by a deed, the operative words of which were, "grant, bargain, and sell,"(*a*) and in which the premises were described "as customary messuages and tenements within the manor of Muncaster, of the yearly customary fineable rent" of a specified amount; and he also, at a court holden for the manor, surrendered the premises into the hands of Lord Muncaster, to the use of him, his heirs and assigns.

In 1812, John Lord Muncaster made his will, whereby he devised all his manors, lands, and hereditaments to trustees, and their heirs, upon trust to sell; and he died in June, 1813, leaving his only child, Lady Balcarras, his heiress at law, and heiress by the custom. Upon his death, his brother, Lowther Lord Muncaster, became tenant for life of the manor. He died in 1817; and then his son Augustus, the present Lord Muncaster, who was not of age till 1823, became tenant of the manor in tail male, and, afterwards, by suffering a recovery, acquired the fee. Lady Balcarras [*33] had been admitted as tenant of the three *customary tenements purchased by her father; and the admittance stated her title to be by descent from him.

The suit was instituted by specialty creditors, for the administration of the estate of John Lord Muncaster. Under an order for the sale of his freehold and copyhold estates, the three customary tenements, which he had bought, were sold, and the present Lord Muncaster became the purchaser. The usual reference as to title was then made; and, before the master, an objection was taken, that, the customary estate was extinguished by the conveyance to John Lord Muncaster in fee; that the three customary tenements, as part of the demesnes of the manor, became subject to the limitations of the manor; and, therefore, that they did not pass by the will of the testator, but

(*a*) In one of the conveyances the words were "grant, bargain, sell, and surrender."

[1] S. C. Taml. 183.

that, upon his death, and the death of his brother, they, as parcel of the manor, became vested in the present Lord Muncaster as tenant in tail.

The certificate of the steward of the manor as to the customs was in the following words: "The custom of the manor of Muncaster, in all cases, requires a customary tenant, disposing of his customary estate, to execute a conveyance to the purchaser in addition to the surrender and admission. On the lord of the manor of Muncaster becoming possessed of any customary estate within the manor, the same would become free, and, if regranted to any one, would require a deed of conveyance, but no admission to this, if the lord had the perpetual right in the manor. I cannot find a single instance, where the lord of the manor of Muncaster, holding in perpetuity, has ever regranted a customary estate within the manor, that they became possessed of. Every purchase, that has been made, is still held in the family. The above is the custom of the manor of Muncaster."

*The master reported in favor of the title; and to his report except- [*34] tions were taken by the purchaser.

The question on the argument of the exceptions was, whether, by the union of the fee of the customary tenement with the lord's estate for life in the manor, the customary tenements were extinguished; or, whether they were only suspended during the continuance of the life estate, and, on the death of the lord, went to his heir at law or devisee.

The heir concurred in the sale; and there was no question between the heir and the devisees in trust.

Mr. *Pepys* and Mr. *Stuart*, in support of the exceptions:—It has been decided in *St. Paul* v. *Viscount Dudley and Ward*,(a) that, if a lord, tenant for life of a manor, with remainder over, purchases copyhold lands holden of the manor, and takes the surrender to himself and his heirs, the copyholds are merged, and become subject, as parcel of the manor, to the same limitations with it. If, therefore, the lands purchased by Lord Muncaster had been copyholds in name, no question could have arisen: and *Doe* v. *Danvers*,(b) shows, that the same principle applies to other customary tenements as well as to copyholds. In *Reay* v. *Huntington*,(c) Lord Ellenborough, speaking of such customary estates as those on which the present question arises, says,(d) "although these appear to have many qualities which do not properly and ordinarily belong to villenage tenure, either pure or privileged, (and out of *one or other of these species of villenage all copyhold is derived,) [*35] and also have some which savor more of military tenure by escuage uncertain, which, according to Littleton, sec. 99, is knight's service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz. the being holden at the will of the lord, and also the usual evidence of title by

(a) 15 Ves. 167. See also *King* v. *Moody*, 2 Sim. & S. 579.
(b) 7 East, 299.
(c) 4 East, 271.
(d) 4 East, 288.

copy of court roll, and are alienable, also, contrary to the usual mode by which copyholds are aliened, viz. by deed and admittance thereon (if, indeed, they could be immemorially aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, which at common law could only have transferred the use ;) I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law, that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question. In the case of *Stephenson* v. *Hall*,(a) Lord Mansfield and Mr. Justice Denison considered it to be a settled point, that, in the case of customary estates, 'the freehold was in the lord.' And, in the very late case of *Burrell* v. *Dodd*,(b) the court of common pleas expressly held these customary tenant-right estates not to be freeholds." These customary tenements, therefore, falling within the same consideration as copyholds, come under the rule established in *St. Paul* v. *Dudley and Ward*; and, by the surrenders, the customary estates were extinguished.

If the customary estates were extinguished by the surrenders, the
[*36] admittance of Lady Balcarras, as entitled *by descent from her father, was altogether null and void ; nor can such admittance operate as a new grant by the lord. *Zouch* v. *Forse*,(c) *Vernon* v. *Vernon*,(d) *Holdfast* v. *Clapham*.(e)

Mr. *Knight*, Mr. *Preston*, and Mr. *Simpkinson*, against the exceptions. The rule, that the copyhold is extinguished, if the copyholder in fee surrenders to the lord, whatever the estate of the lord in the seignory may be, is peculiar to copyholds : the principle of it is, that, in contemplation of law, the estate of the copyholder is only an estate at the will of the lord, and that, by surrender, the less interest is merged in the greater ; and neither the rule nor the principle can apply, where the freehold of the lands is in the tenant.

Whether the freehold be in the tenant or in the lord, is matter of fact, to be ascertained, in each particular case, by the mode of conveyance, and other circumstances which mark the quality of the tenure. Here the estate will not pass by surrender and admittance : there must be a conveyance from the grantor to the grantee ; and that which passes by the conveyance is the freehold : the surrender and admittance are necessary, only to mark the change of tenancy. In *Willan* v. *Lancaster*,(g) and *Hussey* v. *Grills*,(h) the decisions proceeded on the principle, that the freehold of customary lands, holden by a tenure similar to that which exists here, was in the tenant, and not in the lord. *Crowther* v. *Oldfield*,(i) *Rogers* v. *Bradley*.(k)

[*37] *The question then is, whether, by the union of the freehold estate in the lands with the seignory during the life of John Lord Muncaster,

(a) 3 Burrows, 1278. (b) 3 Bos. & Pul. 378. (c) 7 East, 186.
(d) 7 East, 8. (e) 1 T. R. 600. (g) 3 Russ. 109.
(h) Amb. 299. (i) 1 Salk. 364. (k) 2 Vent. 143.

the customary freeholds were extinguished or only supended? The rule, as to suspension and extinguishment, is laid down by Lord Coke(*a*)—"Suspense, in legal understanding, is taken, when a seigniorie, rent, profit apprender, &c., by reason of unitie of possession of the seigniorie, rent, &c., and of the land out of which they issue, are not *in esse* for a time *et tunc dormiunt*, but may be revived or awaked; and they are said to be extinguished, when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is when one man hath *as high and perdurable an estate* in the one as in the other." To the same effect are sections 559, 560, 561, and 562, of Littleton. *Comyn's Digest, Suspension*, (A) & (B). *Roe* v. *Vernon*,(*b*) *Doe on the demise of Newby* v. *Jackson*.(*c*) The doctrines of extinguishment and suspension spring from a rule of tenure, that no one can be lord and tenant at the same time; and the suspension or extinguishment is never to a greater extent than that to which the estate in the seignory and the estate in the land are equal. The customary estates, therefore, though suspended during the life of John Lord Muncaster, revived on his death.

Mr. *Roupell* and Mr. *Lynch*, for other parties in the same interest.

THE MASTER OF THE ROLLS:—A lord of a manor, who was tenant for life only, purchased the fee of three customary tenements, which were *holden of the manor, and which, according to the custom of the man- [*38] or, were conveyed to him by bargain and sale, and also by surrender. The custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold; and *St. Paul* v. *Lord Dudley*,(*d*) and *Doe* v. *Danvers*,(*e*) have, therefore, no application. The necessity of surrender and admittance is probably a remnant of the ancient tenure of villenage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of freehold tenure,—a distinction which is well established.

The question then is, what is the effect of the union of the fee of the customary tenements with the estate for life of the lord? If the lord had been seised of the fee of the manor, then the union would have extinguished the customary tenements; but extinguishment takes place only when the two estates have the same duration. The lord being tenant for life, the effect of the union was to suspend the seignory during the life of the lord, for a man cannot at the same time be lord and tenant; but, at the death of the lord, the seigniory was revived, and the fee of the customary tenements descended to his heir at law. This doctrine is fully stated in Littleton, sections 559, 560, 561, and in Lord Coke's commentary on those sections.

The master's report is, therefore, correct; and the exceptions must be overruled.[1]

(*a*) Co. Litt. 313, a. (*b*) 5 East, 51. (*c*) 1 Barn. & Cres. 455.
(*d*) 15 Ves. 167. (*e*) 7 East, 299.

[1] This case came up before Lord Brougham, who made a different disposition of it. See post, 750.

[*39] *MILES v. LANGLEY.

ROLLS.—1829; November 19.

Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate; A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale, as "late the residence of A.;" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.

TRENCHARD was owner of the Abbots Leigh estate, which consisted partly of certain lands called Woodclose. An adjoining messuage and certain other lands, of which one acre and a half constituted part of a close called Cullhays, were holden by Ames Hellicar under the college of Winchester, by a lease for twenty-one years, renewable by custom at the end of every seven years. The portion of Cullhays comprised in Hellicar's lease, being at some distance from the other lands demised by the college, had been in the occupation of Trenchard: and, in 1798, he and Hellicar entered into an agreement to exchange a part of Woodclose, which was immediately adjoining to the college lands, for Hellicar's part of Cullhays; the exchange being to continue so long as the parties, or those claiming under them, were entitled to the respective properties.

In 1810, the plaintiff Miles became the purchaser of the Abbots Leigh estate. The lands, acquired under the agreement of 1798, were comprised in the conveyance to him: and he had been, ever since 1810, in the occupation of them, and had enclosed them in his park.

Ames Hellicar renewed his lease from time to time; and by his will, dated in 1811, devised the leasehold to his son Thomas Hellicar. He died; and Thomas Hellicar entered into possession of that part of Woodclose which had been given in exchange for part of Collhays, and of all the premises comprised in the lease, except that part of Cullhays.

[*40] *In 1819, Thomas Hellicar became bankrupt; and his assignees put up the leasehold to sale by public auction. In the particulars of sale, the premises were described as a dwelling house with lawn, and about four acres of land attached,(a) two hot houses, &c., "late the residence of Thomas Hellicar;" and the tenure was stated to be leasehold under the college, at a quit rent of 7*l.* a year. Langley became the purchaser. At the time of the purchase, he had no actual notice of the agreement of exchange between Trenchard and Ames Hellicar; and he entered into possession of the exchanged part of Woodclose, considering it to be land comprised in the lease

(a) This, it was suggested at the bar, was the description of the premises in the college lease; the lease, as stated in the bill, purported to demise a "messuage, orchard, garden, stables, and *five* acres of land, with the appurtenances."

from the college. That lease he renewed, and assigned it to his sisters the defendants; who, being afterwards informed of the agreement of exchange entered into in 1798, refused to ratify it, and brought an ejectment to recover that part of Cullhays comprised in the college lease, which, ever since 1798, had been in the possession of the owners of Abbots Leigh.

The present bill was filed for an injunction, and to have the agreement of exchange specifically performed.

The first question was, whether Langley, having the legal estate in that part of Cullhays which he sought to recover, was bound by the agreement of exchange between Trenchard and the elder Hellicar. That question depended upon another,—namely, whether Langley, although he had no express notice of the agreement, had not implied notice, inasmuch as, at the time of his purchase, the plaintiff was, under that agreement, in possession of the exchanged part of Cullhays, which was comprised in the college lease.

*Sir *Charles Wetherell* and Mr. *Wilbraham*, for the plaintiff. The [*41] possession of a tenant or occupier is notice to a purchaser of the actual interest which such tenant or occupier has in the premises, *Daniels* v. *Davison*.(a) Part of the premises which Langley bought, were, at the time of the purchase, and had been, for many years before, in the possession of the plaintiff Miles: Langley, therefore, had notice of the title of Miles—in other words, of the agreement of 1798. He can escape from this conclusion only by saying, that he did not know that the lands occupied by Miles were part of the lands comprised in the lease. Whether he had actual knowledge of the fact or not, is immaterial; every purchaser must be presumed to know what the lands are which are included in his contract. Can Langley be heard to say, that the exchanged portion of Cullhays is part of the leasehold which he purchased, and yet that he shall be considered at the same time as not having been aware, when he made the purchase, that the leasehold did comprise a part of Cullhays?

The premises are described in the particulars of sale as having been "late the residence of Thomas Hellicar." Thomas Hellicar had occupied part of Woodclose along with them; and Langley supposed he was contracting for premises which included that part of Woodclose. He, therefore, had implied notice of the agrement, under which Woodclose had been occupied by Thomas Hellicar.

In short, Langley either meant to purchase the premises which had been actually occupied by Hellicar, or he meant to purchase the very premises which now appear to be comprised in the college lease. In the one case, *he has gotten all that he meant to get; in the other, he must [*42] be presumed to have notice of the title, under which part of the premises, comprised in the lease, were occupied by Miles.(b) If he thought he

(a) 16 Ves. 249.

(b) *Taylor* v. *Stibbert*, 2 Ves. jun. 437. *Hall* v. *Smith*, 14 Vesey, 426. *Allen* v. *Anthony*, 1 Mer. 282.

was purchasing Cullhays, he was bound to inquire of Miles, under what title he held it; and if he forbore to make such inquiry, in consequence of his not having been aware that he was purchasing Cullhays, he surely cannot be in a better situation with respect to his rights as against the plaintiff, than if Cullhays had been expressly within his contemplation, as part of the property of which he intended to be the purchaser.

Mr. *Tinney* and Mr. *Benson*, contra.

THE MASTER OF THE ROLLS:—In this case the first question is, whether the Langleys having the legal estate in that part of Cullhays, which they have sought to recover, are bound by the agreement of exchange between Trenchard and Ames Henniker. And it has been argued for the plaintiff, that, although Langley had no express notice of the agreement, yet he had implied notice; because the plaintiff, at the time of Langley's purchase, was in possession of the exchanged part of Cullhays, which was comprised in the college lease, and, therefore, upon the principle of the case of *Daniels* v. *Davison*, decided by Lord Eldon, Langley must be taken to have known the title under which the plaintiff held the exchanged land.

In *Daniels* v. *Davison*[1] Lord Eldon held, that a purchaser was bound to inquire of the occupier of the land which he was about to purchase, [*43] what was the title *under which he occupied, and was therefore to be considered as having implied notice of the nature of that title.[2] That principle has no application here; Langley being totally ignorant of the fact, that the plaintiff occupied any land comprised in the lease which he purchased,—the exchanged land of Woodclose making up the quantity described in the college lease. If it be said that Langley ought to have inquired of the bankrupt Thomas Hellicar, what was the nature of the title under which he occupied Woodclose, the answer is, that the bankrupt was not then in the occupation of Woodclose, although he had been so before his bankruptcy; and Lord Eldon's principle in *Daniels* v. *Davison* cannot, where the possession is vacant, be extended to the last occupier.

My opinion, therefore, is, that, as Langley had no notice, either express or implied, of the equitable agreement under which the plaintiff claims, the defendants have a right to avail themselves of their legal title; and the bill must be dismissed with costs.[3]

[1] Lord Brougham says, in *Miles* v. *Langley*, 2 Russ & M. 629, "It has always been considered that *Daniels* v. *Davison*, went a great way;" and in reference to the same case,—Wigram V. C. says, it "has always been considered an extreme case." *Jones* v. *Smith*, 1 Hare, 62. Story J. says, "it would be pushing the doctrine of constructive notice to a great degree of extravagance to hold, that the purchaser was bound to know not only the title of the party in possession, but all its derivative sources." *Flagg* v. *Mann*, 2 Sumn. 555.

[2] Vide *Hanbury* v. *Litchfield*, 2 Myl. & K. 633. *Chesterman* v. *Gardener*, 5 Johns. Ch. Rep. 29. *Hoxie* v. *Carr*, 1 Sumn. 193.

[3] Affirmed, 2 Russ. & M. 626. And see *Jones* v. *Smith*, 1 Hare, 43, 60, 62.

COCKLE *v.* WHITING.

ROLLS.—1829; November 20.

Semble, if a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bona fide* in expectation of a favorable decree—or if the solicitor of the plaintiff guarantee his client against the costs of the suit—the court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs.

AT the hearing of the cause, in July, 1829, the bill had been dismissed with costs; and, the plaintiff having, a short time before, left England on a voyage, to the South Seas, the defendants presented a petition, praying that the solicitors of the plaintiff might be ordered to pay to them the taxed costs of the suit, or that it might be referred to the master, to [*44] inquire under what circumstances the suit had been commenced and carried on.

The petition was founded on two grounds; first, that the suit was so frivolous and vexatious, that it could not have been instituted *bona fide*, in expectation of a favorable decree of the court, but was intended merely for the purpose of exacting money from the defendants, as the price of avoiding litigation; and, secondly, that the solicitor of the plaintiff had guarantied his client against the expenses of the suit, and that it was, in truth, therefore, the suit of the solicitor.

Mr. *Knight* and Mr. *Jacob* in support of the petition, cited *Dungey* v. *Angove*.(a)

Mr. *Bickersteth* and Mr. *Phillimore*, contra.

THE MASTER OF THE ROLLS stated, that, if the petitioner had established either of the two grounds upon which the petition proceeded, he would have made an order according to the prayer of the petition; but that it appeared to him, that a decree in favor of the plaintiff might, under the circumstances, have been *bona fide* expected, and that the weight of evidence was against the allegation, that the solicitor of the plaintiff had engaged to guarantee his client against the costs of the suit.

(a) 2 Ves. jun. 304, 313.

[*45] *FEREDAY *v.* WIGHTWICK.

ROLLS.—1829 ; November 19, 23.

Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern.

Where an annuity is granted for a term of years, to be paid half yearly, and, at the same time, promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half yearly payments will repay the purchase money with interest, exceeding the rate of 5*l.* per cent., the transaction is usurious.

IN this case, six persons, having taken a lease for years of certain mines, and also another lease of the surface lands under which the mines were situated, worked these mines and occupied the surface lands, as a joint and partnership concern, dividing the same among them in equal shares. One of these six persons, Turton by name, assigned his shares by way of security for money advanced, and then became bankrupt. He had been manager of the concern, and was greatly indebted to it at the time of his bankruptcy.

The present bill was filed by such of the original partners as continued to be interested in the concern, and by other persons who either were the representatives of deceased original partners, or claimed as purchasers of shares. The prayer was, that the partnership property might be sold, and the partnership accounts taken, and that it might be declared that the shares of the partner, who had become bankrupt, ought, in the first place, to be applied in repaying to the partnership the debt which he had incurred in the management of the concern.

The principal question in the cause was, whether the plaintiffs were entitled to the relief last stated : the defendants, who claimed under the bankrupt partner, insisting, that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property.

Mr. *Bickersteth* and Mr. *Rolfe*, for the plaintiffs :—As the mines have been worked, and the surface has been used at the common expense of all
[*46] the partners, and *for their common profit, the lease must be considered as acquired for the purposes of a partnership concern. Such an interest in mines as exists here is considered, not as a joint interest in lands, but as a partnership in trade : *Story* v. *Lord Windsor*,(*a*) *Crawshay* v. *Maule*,(*b*) *Jeffreys* v. *Smith*.(*)(*c*) In the latter case, Lord Eldon(*d*) adopts and sanctions the observation of Lord Hardwicke, "that a colliery is to be considered in the nature of a trade, and where persons have a different interest in it, it is to be regarded as a partnership." In *Crawshay* v. *Maule*, Lord Eldon, speaking of leases of coal mines and iron works, says,(*e*) "It seems difficult to establish that this is an interest in land, distinct from a partnership in trade—a mere interest in land, in which

(*a*) 2 Atk. 630. (*b*) 1 Swanst. 495. (*c*) 1 Jac. & Walk. 298.
(*d*) 1 Jac & Walk. 302. (*e*) 1 Swanst. 518.
(*) See *Jeffreys* v. *Smith*, 3 Russell, 158.

a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership trade:" and the order made in that case amounted to a decision, that the lessees were, as to the working of the mines, partners in trade.

The consequence is, that these leases, being in the nature of general partnership property, must be sold, now that the partnership is dissolved; and, as each partner's portion of the proceeds of the sale must be first applied in discharging any debt which may be due from him to the company, the incumbrancers of Turton's shares, and Turton's assignees, will not be entitled to any thing, till the whole debt is satisfied which Turton has incurred to the concern.

*Mr. *Lovat*, for defendants in the same interest with the plaintiffs. [*47]

Mr. *Tinney*, for the assignees of Turton.

Mr. *Pemberton* and Mr. *Wilson*, for incumbrancers of Turton's shares, contra:—*Crawshay* v. *Maule* was not a case, in which tenants in common of certain mines concurred in working them and selling the produce.(*a*) In that concern, large quantities of iron were manufactured, sometimes from the materials obtained from the premises which were in lease to the partners, and sometimes from materials purchased elsewhere. The proprietors were in the habit of making very considerable purchases of iron ore, pig iron, finers' metal, old wrought iron, and naval and ordnance stores, for the purpose of manufacturing these materials into various sorts of iron, and re-selling them in a manufactured state; it was expressly stated that these purchases were made with a view to profit by manufacturing the articles so bought into iron for resale, and not merely for the purpose of improving by mixture the iron of the works, or bringing it in a better state to market: and, from the first establishment of the works, the iron, stone, coal, and limestone, produced from the mines in lease, had never been sold in their natural state, except a small quantity of coal. Under such circumstances, it was impossible to say, that there was not a partnership trade; but if the parties had merely concurred in working mines demised to them as tenants in common, Lord Eldon would have applied a different rule of decision.(*b*) "With respect," said he, "to mere joint *interests in land, I apprehend the [*48] rule to be different: the parties then becoming tenants in common, each cannot call upon his companions to concur in a sale, but must sell his own interest. It is said that this is only the case of a tenancy in common of a mine; if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships." In *Jefferys* v. *Smith*, the order for the appointment of a receiver proceeded,

(*a*) See 1 Swanst. 524, 525. (*b*) 1 Swanst. 522, 523.

not on the notion that the court was dealing with a trading partnership, but on the principle, that,(*a*) "where there are part owners of a mine, and they cannot by contract agree to appoint a manager, this court will manage it for them." "Here," says Lord Eldon,(*b*) "there are twenty shares; and if each owner may employ a manager and set of workmen, you destroy the subject altogether; it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of any case, that, where persons are concerned in such an interest in lands as a mining concern is, this court will appoint a receiver, although they are tenants in common of it." There is no case which carries the doctrine further than *Crawshay* v. *Maule*. If the rules, which are applicable to common trading partnerships, were to be extended to part owners of mines, it is difficult to foresee what consequences would follow, affecting interests of the greatest magnitude, and placing many individuals of the highest rank and fortune in situations which they never contemplated.

If this mining concern had been a partnership in trade, it would have been terminated by the death or bankruptcy of any of the parties; and none of the lessees could have assigned his share, with the concurrence [*49] *of the rest. Here the shares were transferable without the concurrence of the other part owners; and the concern was not dissolved by the death or bankruptcy of any of them. It had, therefore, none of the characteristics of a partnership.

Even if we call this concern a partnership, it must be conceded, that all the usual qualities of a trading partnership do not belong to it: and by what rule are we to distinguish such of the qualities of an ordinary trading partnership, as belong to a concern like this, from such of them as do not belong to it?

On the whole, the parties interested in this concern must be considered as tenants in common of the mines and other premises comprised in the leases; and one tenant in common of real estate cannot, in respect of a debt due from him to another tenant in common, claim a lien, independently of specific contract, on his debtor's undivided share of the real estate.

THE MASTER OF THE ROLLS:—The general principle is, that all property, acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership. It is true, a mining concern differs in some particulars from a common partnership:—the shares are assignable, and the death or bankruptcy of the holder of shares does not operate as a dissolution:—but it has been repeatedly held to be in the nature of a trading concern [1] In *Crawshay* v. *Maule*, Lord

(*a*) 1 Jac. & Walk. 302. (*b*) 1 Jac. & Walk. 303.

[1] "I confess (says Sir J. Leach, M. R.) I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership

Eldon expressed a doubt, whether, if persons, previously entitled as tenants in common to mines, were to form a mining concern, the general *principles of a partnership would apply to such a case, and I am not [*50] aware that the particular point has ever been decided; but the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle is therefore to be applied to it.

The defendant, Wightwick, claimed under Turton, as the purchaser of an annuity of 664*l.* 18*s.* for the term of eleven years and a half. This annuity was secured on Turton's shares, and the consideration paid for it was a sum of 4000*l.* The purchase deed contained a covenant to pay the annuity half yearly; and the bankrupt also gave to the purchaser twenty-three promissory notes, being each for a half year's payment, payable respectively at the successive times when the successive half yearly instalments of the annuity would become due. It appeared in evidence, that the twenty-three half yearly payments would pay the sum of 4000*l.*, together with interest at nearly 12*l.* per cent. per annum; and a question was made, whether this transaction was usurious.

Mr. *Bickersteth*, Mr. *Rolfe*, and Mr. *Lovat*:—Annuities for lives have been held not to be within the statute against usury, because the principal of the purchase money is put in hazard by reason of the uncertain duration of human life; and it is a mere contingency, so far as depends on the contract for the purchase of the annuity, whether the grantee will ever receive back the principal sum advanced by him. Here there is no contingency; neither principal nor interest is put in hazard: the contract is, that, in consideration of 4000*l.*, twenty-three successive half yearly payments shall be made to Wightwick; and the amount of these *twenty-three payments is [*51] such as will replace the 4000*l.*, with 12 per cent. interest. Such a contract is clearly in violation of the statute. In *Doe* v. *Gooch*,(*a*) Mr. Justice Bayley says, "In that case (viz., the case of a life annuity) the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received."

(*a*) 3 Barn. & Ald. 660.

capital, and to have to every intent, the quality of personal estate: and in the case of *Fereday* v. *Wightwick*, I had no intention to confine the principle to the partnership demands. Lord Eldon has certainly upon several occasions expressed such an opinion, &c. and general convenience requiries that this principle should be adhered to." *Phillips* v. *Phillips*, 1 Myl. & K. 649, 663. But where parties, being tenants in common of land, agree to carry on farming business, which is not a trade, in partnership, and afterwards, carry on some trade, as collateral to, and arising out of the principal business of farming, upon the land, the land is not converted into personalty. *Randall* v. *Randall*, 7 Sim. 271.

Mr. *Pemberton* and Mr. *Wilson*, contra :—The only authority, cited to impeach this transaction, is the dictum of Mr. Justice Bayley. He does not say, that an annuity for a certain number of years, which will, in the whole, yield more than the amount of the purchase money with legal interest, is usurious; but he states, that there is no case in which such an annuity has been held not to be usurious; and in that assertion he is unquestionably mistaken. In *Finch* v. *Tanfield*,(*a*) Tanfield, in consideration of 566*l.* 13*s.* 4*d.*, granted to Finch an annuity of 130*l.* for twenty-three years. In *Cotterell* v. *Harrington*,(*b*) a rent certain of 20*l.* for eight years, and a contingent rent of the same amount for two years longer, were granted in consideration of 110*l.* These cases were held not to be within the statutes of usury; and yet, in each of them, the annuity for a number of years certain would exceed the amount of the purchase money, with interest at 10 per cent.,(*c*) which was then the legal rate. In *Rowe* v. *Bellasys*,(*d*) the contract upon a loan of 100*l.*, made [*52] in June or July, *was, that the borrower should pay to the lender 40*l.* upon the 20th of January and 20th of July, by equal portions annually, next after the 20th day of the then instant month of July, till 120*l.* was paid. This exceeded 6*l.* per cent., which, under the 12. Car. 2, c. 13, was the legal rate of interest. But it was held that the contract was not usurious, being a purchase of an annuity for three years. Not one of these decisions has ever been questioned or impeached; there are other decisions to the same effect,(*e*) and there is no decision to the contrary. The transaction between Wightwick and Turton was for the purchase of an annuity, and not for a loan of money: Wightwick swears that there was no loan nor any communication between them concerning a loan. According to the authorities, therefore, Wightwick's annuity is valid, and the securities cannot be impeached, except by introducing into our law a new principle not sanctioned by any former decision.

The Master of the Rolls :—With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of 4000*l.*, with interest, by twenty-three instalments; and, as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious.[1]

(*a*) 1 And. 121, pl. 169. Cro. Eliz 27. (*b*) Brownl. 180.
(*c*) 37 Hen. 8, c. 9, and 13 Eliz. c. 8. (*d*) Sid. 182.
(*e*) See Vin. Abr. vol. xxii. Usury (F). Comyn on Usury, 43—71.

[1] Vide *Chillingworth* v. *Chillingworth*, 8 Sim. 404.

*LEES *v.* NUTTALL.[1] [*53]

ROLLS.—1829; November 24.

If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal.

THE bill prayed that the defendant Nuttall might be declared a trustee for the plaintiff Lees, of all the right and interest which he had acquired in a certain estate, and that he might be decreed to convey such right and interest, to the plaintiff.

The wife of the plaintiff and her sister, as administratrixes of their father were entitled to a mortgage debt charged on the premises in question; and the plaintiff, in his right of his wife and with the sanction of the sister, had long been in possession of the premises as mortgagee. He was desirous of becoming the owner of the equity of redemption, which was in the defendant Walker; and in 1818, he employed Nuttall as his attorney to negotiate the purchase. Various attempts were made to accomplish this object, but without success. In March, 1824, a fresh negotiation was opened by the defendant Walker, who wrote a letter to Lees, proposing to sell the premises to him for 1,200*l.* This letter was dated the 25th of March; and Lees having determined to accede to the terms, sent his son on the following day to inform Walker that he accepted his offer. On the 27th of March, the son, by the direction of his father went to Nuttall, and, having informed him of what had been done, instructed him to draw a formal agreement of purchase, and to procure Walker's signature to it. Nuttall did not, on that occasion, profess any unwillingness to act as the agent of the plaintiff, or intimate that he was in treaty for the purchase of the property on his own account; but, within a day or two afterwards, he went over to the place of Walker's residence, and, in his own name, entered into a [*54] written agreement, dated the 29th of March, 1824, for the purchase of the premises at 1000*l.* This agreement did not purport to be entered into on behalf of Lees.

The defendant, Nuttall, by his answer, claimed the benefit of the purchase stating, that for two months before the 29th of March, 1824, he had been in treaty with Walker for the purchase of the equity of redemption; that he entered into the agreement with Walker on his own account; and that he did not, in the transaction, consider himself as the attorney of Lees.

The material facts of the plaintiff's case were established by evidence.

Mr. *Pepys* and Mr. *K. Parker*, for the plaintiff.

Mr. *Bickersteth* and Mr. *T. Parker*, for the defendant.

THE MASTER OF THE ROLLS, on the ground that Nuttall had been em-

[1] S. C. Taml. 282.

ployed by the plaintiff as his agent for the purchase of the estate, made a decree against Nuttall according to the prayer of the bill and with costs.[1]

[*55] *Brough v. Oddy.[2]

1829; November 24.

A court of equity will not entertain a bill for the specific performance of an agreement to pay, in a certain event, which has happened, an annual sum by quarterly instalments.

Brough the elder had deposited the title deeds of some leasehold property with the plaintiff Mrs. Brough, as a security for a sum of 900*l.* which he owed her; and he and his son, being desirous of raising money by the grant of an annuity to be charged on these leaseholds, requested her to give up the deeds to them, in order to enable them to accomplish that purpose; offering, as an inducement to her to consent to the proposal, to procure for her the indemnity of Mrs. Oddy, the mother in law of the younger Brough. The plaintiff expressed her willingness to part with the deeds, upon having the proposed indemnity; and on the 7th of March, 1823, Mrs. Oddy wrote to her a letter, in which she stated that, at the request of Brough, she, Mrs. Oddy, was willing, in the event of his raising money by means of the security of the leasehold premises, to become guarantee to her to a specified amount per annum. This letter was delivered to Mrs. Brough by John Brough the younger; and, on receiving it, Mrs. Brough gave him the title deeds of the leaseholds. Shortly afterwards, the following memorandum of agreement, dated the 14th of April, 1823, was signed by Mrs. Oddy:—

"By these presents be it known, that, under the following considerations, and the conditions hereinafter specified, I, the undersigned Margaret Oddy, &c., do hereby engage and make myself responsible to Mrs. Mary Ann Brough, &c., for the yearly payment of the sum of 29*l.* 19*s.* 6*d.* of
[*56] lawful money of Great Britain. *Whereas the said Mary Ann Brough hath yielded up to Mr. John Brough, &c., for his use and benefit, certain securities, which were placed in her hands by Mr. John Brough the elder, &c. for securing to her the due payment of a certain sum to her annually; and whereas the said John Brough hath, by means of those securities,

[1] Affirmed, 2 Myl. & K. 819. See further *Fawcett* v. *Whitehouse*, post, 132. *Hichens* v. *Congreve*, post, 150. *Flagg* v. *Mann*, 2 Sumn. 486. *Brown* v. *Lynch*, 1 Paige, 147. *Giddings* v. *Eastman*, 5 Paige, 561. *Benson* v. *Heathorn*, 1 Yo. & Col. C. C. 326. *Parkist* v. *Alexander*, 1 Johns. Ch. Rep. 397. *Taylor* v. *Salmon*, 4 Myl. & Cr. 134. *Reed* v. *Warner*, 5 Paige, 650. *Smith* v. *Burnham*, 3 Sumn. 468. *Baker* v. *Whiting*, id. 476. *Carter* v. *Palmer*, 1 Dru. & W. 722. 2 Myl. & Cr. 374, n. 1. So, an agent employed to compromise his principal's debts, cannot buy them in on his own account. *Reed* v. *Norris*, 2 Myl. & Cr. 374. *Reed* v. *Warner*, ubi supra.

[2] S. C. Taml. 215.

raised a sum of money for his benefit on annuity, for the due payment of which annuity those securities are made liable; the before mentioned Margaret Oddy doth hereby engage to pay the said Mary Ann Brough the sum of 29*l.* 19*s.* 6*d.* annually, by quarterly payments, in the event that the before said John Brough doth not duly pay the said annuity, and by cause of which non-payment those securities shall be taken for that purpose; it being understood, that, whereas the said John Brough is, by virtue of his marriage with my daughter, entitled, under certain circumstances and conditions, to become possessed of a sum of money, part of my present estate, should he come into such possession of such money, from and after that time this bond shall be null and void."

About the same time, the elder Brough gave the plaintiff the following memorandum:—"Received of Mrs. Mary Ann Brough the lease of all my property situated in Islington, which had been placed in her hands as security; as also the counterpart of a lease of a house let to Mr. Cunliffe at 48*l.* 10*s.* per annum, for the purpose of assigning that sum in payment of an annuity, which I hereby engage to return to her so soon as that purpose is accomplished."

In the mean time, the Broughs had raised a sum of money by the grant of an annuity of 40*l.* a year, *which was secured by an assign- [*57] ment of the leaseholds. This annuity was soon permitted to fall into arrear; and Mrs. Brough had been under the necessity of paying several of the instalments, in order to prevent the annuitant from enforcing his security against the leaseholds. Under these circumstances, she filed her bill, praying that the defendant, Mrs. Oddy, might be compelled to perform specifically the agreement contained in the letter of the 7th of March, and the memorandum of the 14th of April; and that she, the plaintiff, might be declared entitled to be reimbursed, or indemnified against, all payments not exceeding the annual sum of 40*l.*, or the annual sum of 29*l.* 19*s.* 6*d.*, which she had made, or should thereafter be called on to make, towards payment of the annuity, in exoneration of the leasehold premises.

The defence set up by the answer was, that the intention of the parties was merely to give the plaintiff a guarantee against being made personally liable for any instalment of the annuity.

The Master of the Rolls stated, that, according to the representations of the defendant, the object of the transaction was to give the plaintiff a security against a liability which could not possibly arise; since, in no event could the plaintiff be personally liable for an annuity, to the grant of which she was not a party. Such could not have been the intention of the parties. But the true question was, whether any case was made for the interference of equitable jurisdiction, and whether the court was not under the necessity of leaving the plaintiff to her remedy at law? And his Honor desired the counsel for the plaintiff to direct their attention to that point.

*Mr. *Pemberton* and Mr. *Girdlestone*, jun., for the plaintiff:—Sub- [*58]

ject to the annuity, the plaintiff must still be considered as equitable mortgagee of the leaseholds; and the agreement of the defendant is in substance this,—that, if there is default in the regular payment of the annuity, she will pay the plaintiff (who, in that event, must make good the annuity, in order to prevent the destruction of her own posterior security,) the sum of 29*l.* 19*s.* 6*d.* by quarterly payments. In the *Earl of Ranelagh* v. *Hayes*,(*a*) the court decreed the specific performance of a covenant to save the earl harmless in respect of certain payments, and directed the master, *toties quoties* any breach should happen, to report the same specially to the court. The present case falls within the same principle. The plaintiff would have no adequate remedy at law; for she would be compelled to bring a new action every successive quarter of a year. She has a right to come to a court of equity to ask such a decree, as will afford her complete relief at once, and will compel the defendant to give a security on property for the due performance of the agreement of indemnity into which she has entered.

The Master of the Rolls stated, that here the engagement was to pay a sum of 29*l.* 19*s.* 6*d.*, annually by quarterly payments, if a certain event happened; that, admitting the event to have happened, on which the payments were to be made, the remedy of the plaintiff was by an action at law; that a personal engagement was not an indemnity, in the proper sense of the phrase; and that he was not aware of any case in which, where the contract [*59] created only a personal obligation, the court *had ordered a party to give a security on property for its due performance.

On the ground, therefore, that no case was made for the interference of a court of equity, his Honor dismissed the bill, with costs.

Godfrey v. Littel.[1]

1829; November 17, December 3, 7.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief: and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case.

This was a bill filed by the president of Queen's college, Cambridge, for a commission to ascertain and set out lands belonging to the college, which were in the possession of the defendant.

It appeared that the defendant and his ancestors had, from the time of Henry VIII., been lessees, under the college, of a certain field, called Lacy

(*a*) 1 Vern. 189.

[1] S. C. Taml. 221.

Field, which, in the leases, was uniformily described as containing, by estimation, sixty acres. On the expiration of the last lease, the defendant delivered up to the college forty acres only, according to statute measure; alleging, that, by the custom of the country, there were only three roods in computed acres.

The defendant insisted, that the lands of the college were bounded by a way called the Chace way, and were entirely on what was called "the right side of that way." The plaintiff alleged, that parts of the lands of the college were on the left side of that way; but the testimony of his witnesses differed as to the quantity of land belonging to the college on that left side. The defendant claimed the land on the left side as being his copyhold *property, held of a manor of which Queen's college were the [*60] lords.

Mr. *Rose*, Mr. *Tinney*, and Mr. *Lowndes*, for the plaintiff.

Mr. *Bickersteth*, Mr. *Pemberton*, and Mr. *Skirrow*, for the defendant:—It was contended, on behalf of the defendant, that, in point of fact, no part of the lands on the left side of the Chace way belonged to the college. Even if that point were doubtful, the right of the president of the college was purely legal; and, as there was no impediment to his proceeding at law, he ought to be left to his remedy by ejectment. No ground had been laid for the interposition of equitable jurisdiction. If that interposition was asked, because the defendant, while lessee, had, in violation of his duty as tenant, confused the boundaries, the answer was, that the fact of confusion of the boundary was denied, and that the defendant was ready, meeting the plaintiff in ejectment, to prove, that the lands claimed by the college were his own. Suppose a commission were to issue, what would the commissioners have to set out? The plaintiff did not pretend to have proved that any certain quantity of land on the left side of the road belonged to him; and a commission should always specify, how much the commissioners were to set out. The plaintiff had failed in his evidence in the cause; was he to supply the defects and remedy the contradictions of his evidence in the cause, by making a new case before the commissioners? In a suit to ascertain boundaries, a plaintiff was bound to show that he was entitled to some lands which had been confused with those of the defendants; that those lands were of a certain specified extent; and that there was some equitable *ground for the interposition of the court. *Wake* v. [*61] *Conyers*,(a) *Speer* v. *Crawter*.(b) It was admitted, that the plaintiff had not shown, what was the extent of the lands which he claimed to be his; and, either the bill must be dismissed, or, at the utmost, it could only be retained for a time, with liberty to the plaintiff to bring an ejectment.

On behalf of the plaintiff, it was replied, that the circumstance of confusion

(a) 1 Eden, 331. (b) 2 Mer. 410.

of boundaries rendered it impossible for the plaintiff to proceed by ejectment, because he could not distinguish the specific lands, which belonged to the college, from those which were the property of the defendant. Upon the evidence there could be no reasonable doubt, that a portion of the land on the left side of the road belonged to the college; and they would be entirely without remedy, unless a court of equity assisted them by either granting a commission or directing an issue.

At the original hearing the Master of the Rolls expressed himself to be satisfied by the evidence in the cause, that part of the land on the left side of the Chace way belonged to the college; but, by reason of the difference in the testimony of the plaintiff's witnesses as to the quantity of that land, he desired precedents to be searched for, in order to ascertain, whether it was the practice of the court to authorize commissioners to ascertain the quantity, or to direct an issue for that purpose.

December 3.—On this day the following cases were cited: *Lethieullier* v. *Lord Castlemain*,(*a*) *Metcalf* v. *Beckwith*,(*b*) *Speer* v.
[*62] **Crawter*,(*c*) *Duke of Leeds* v. *Earl of Strafford*,(*d*) *Willis* v. *Parkinson*,(*e*) *Wilkinson* v. *Allott*,(*g*) *Rous* v. *Barker*,(*h*) *Wake* v. *Conyers*,(*i*) *The Bishop of Ely* v. *Kenrick*.(*k*)

December 7.—The Master of the Rolls.—It appears, by the authorities which have been referred to, that, to sustain a bill of this nature, it is necessary, that the plaintiff establish a clear title to some land in the possession of the defendant; and, according to the case in Bunbury,(*l*) the court will not direct an issue to try the title, if it be left in doubt upon the evidence in the cause. It has been argued that the title of the plaintiff must appear by the admission of the defendant, and that it is not enough that it be established to the satisfaction of the court by the evidence in the cause. That proposition is not countenanced either by authority or by principle, and is manifestly untenable; for, if such were the rule, there never could be a decree for the plaintiff in a suit of this nature, as no defendant would admit the plaintiff's title.

In this case I am of opinion that the plaintiff has established by evidence a clear title to some land in the possession of the defendant.

According to the doctrine of Lord Northington in *Wake* v. *Conyers*, and of Sir William Grant in *Speer* v. *Crawter*, the plaintiff must also make
[*63] out, that he has *some equitable ground upon which to call for the assistance of this court; and he will otherwise be left to seek his remedy at law. The confusion of boundaries by the defendant, or those under whom

(*a*) 1 Dick. 46. (*b*) 2 P. Wms. 376. (*c* 2 Mer. 410. (*d*) 4 Ves. 180.
(*e*) 2 Mer. 507. (*g*) 3 Bro. P. C. Tomlins' edit. 684. (*h*) 4 Bro. P. C. Tomlins' edit. 660.
(*i*) 1 Eden's Ca. Ter. Ld. Northington, 331. (*k*) Bunb. 322. (*l*) Bunb. 322.

he claims, is an equitable ground. Here the boundaries are certainly confounded; and the confusion must be intended to have been the act of those who, for centuries, have been in possession of the land. It is in evidence, that the hedge, which now separates the land on the left side from the Chace way, has been made within the last sixty years; and there is now no boundary to distinguish the particular parts of the land on the left of the Chace way, to which the plaintiff and defendant may respectively be entitled.

When the court is satisfied with the plaintiff's title, and that he has an equitable ground for the assistance of this court, the authorities will justify the court in affording relief either by a commission or by an issue, as will best advance the justice of the particular case: and as an issue might not finally settle the question between the parties, I am of opinion that the proper proceeding here will be, to direct a commission to inquire and ascertain, what part of the lands in the possession of the defendant on the left side of the Chace way is the property of Queen's college, and to set out the same, with the usual directions in that behalf.[1]

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*DAVIS *v.* SPURLING.[2] [*64]

1829; November 26, 27, December 3.

An executor who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate.

If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify.

If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff.

IN this case the bill was filed to avoid a release given upon a settlement of accounts relative to the assets of Whimper Bradey and John Bradey, and to have the accounts retaken, or surcharged and falsified.

Whimper Bradey and John Bradey were brothers, and they were entitled, as tenants in common in fee, to a freehold estate. Whimper Bradey, by his will, appointed John Bradey, Benjamin Colchester, and John Spurling his executors: and he empowered his brother John Bradey to sell his, the testator's, moiety of the freehold estate. If the sale did not take place in John Bradey's lifetime, then the testator directed and empowered the surviving executors or executor, as soon as might be after his brother's death, to sell the

[1] Affirmed, 2 Russ. & M. 630. Et vide, *Rayley* v. *Best*, post, 659.

[2] S. C. Taml. 199.

same premises; and he declared his will to be, that, whenever the premises should be so sold, the clear moneys arising from such sale, together with the rents of the premises until the completion of the sale, should be applied and disposed of in the same manner as his personal estate, subject to the payment of his funeral and testamentary expenses and debts.

After the death of the testator, the three executors proved the will; but the execution of the trusts was left almost exclusively to John Bradey:
[*65] and he sold the *freehold estate, as well his brother's moiety as his own moiety. In that sale he employed, as his agent, his co-executor Colchester, who was an auctioneer. Colchester, after an ineffectual attempt to dispose of the property by auction, sold it by private contract, and, on the execution of the conveyance by John Bradey, received the price of the estate from the purchaser, and paid it over to John Bradey's banker on that gentleman's separate account. The money was afterwards misapplied by Bradey.

One question in the cause was, whether Colchester was personally answerable for the misapplication by John Bradey of the price of Whimper Bradey's moiety of the estate.

Mr. *Bickersteth* and Mr. *Parker*, for the plaintiffs:—The produce of this real estate was to be applied as part of the personal assets; and it was incumbent on each executor to protect the property, which, in the execution of the trust reposed in him, it would be his duty to administer. Colchester ought not to have placed the price of the real estate in a situation exposing it to be wasted. It is the settled doctrine of the court, that, if one of several executors receives part of the assets, and afterwards hands it over to another executor, who wastes it, he, who so hands the money over, is answerable for the mal-administration of the other. That rule applies here. Colchester, having received the money, ought not to have parted with it, but ought to have retained it for the purpose of being administered under the will: and as he has paid it over to his co-executor by whom it has been misapplied, he must be responsible for the loss.

Mr. *Knight* and Mr. *Turner*, contra.

[*66] *The Master of the Rolls held, that Colchester was not answerable:—that, where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, shall be answerable for their misapplication, because he had a legal right to retain them, and might have preserved them, and it was his duty to do so, unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt:—but that, in the present case, Colchester had no legal right to retain the price of Whimper Bradey's moiety of the estate; for it was in his hands, not as executor, but simply as

agent of John Bradey, who alone had the power to sell that moiety, and to receive the price of it.[1]

Another question in the cause arose out of the following transaction:—Colchester had been the agent and farming bailiff of John Bradey, and had been directed by him, shortly before his death, to make certain payments out of a sum of 177*l.*, remaining in his hands, on John Bradey's account, and to retain the balance for his own use. The balance amounted to 132*l.*; and, acting under the impression that he was entitled to keep this sum, he had not introduced it into those accounts of John Bradey's estate, on which the defendants relied as a bar to the suit; but, within a fortnight after the settlement of the accounts, he communicated the circumstance to the plaintiffs, stating, that he was ready to pay the money, if the plaintiffs thought he had not a right to retain it: and the plaintiffs demanded and received the 132*l.*, before the bill was filed.

*Mr. *Bickersteth* and Mr. *Parker*, for the plaintiffs:—If this sum of [*67] 132*l.* had not been paid over before the institution of the suit, there would have been a plain error in the accounts, and there must have been a decree to surcharge and falsify them; for to induce the court to make such a decree, it is not necessary to establish more than one mistake. The payment of the money makes no difference; it is, indeed, the strongest confession, that the accounts are erroneous: the error remains in the accounts; and accounts, in which it is admitted that there is at least one error, must be open to be surcharged and falsified.

On the other hand, Mr. Knight answered, that an error, which was discovered and corrected, ceased to have any existence as an error; that the accounts, on which the defendants insisted, were accounts in which this error had been admitted and corrected; that a plaintiff is permitted to surcharge and falsify, only where, in the progress of the suit, he shows that there are some erroneous items in the account on which the defendants rely as true and settled accounts; and that it was impossible to say, that a plaintiff had established, in the progress of the suit, the fact of their being an error in the

[1] Vide *Dove* v. *Everhard*, post, 231. *Stacey* v. *Elph*, 1 Myl & K. 195. *Clough* v. *Bond*, 3 Myl. & Cr. 490, 8, n. 1. Lloyd & G. 122, n. a. *Edmonds* v. *Crenshaw*, 14 Peters, 166. *Fairfax's Executors* v. *Fairfax*, 5 Cranch, 19. *Douglas* v. *Satterlee*, 11 Johns. Rep. 16. *Williams* v. *Nixon*, 2 Beav. 472. Where an executor by his negligence suffers his co-executor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the heirs and next of kin for the estate thus wasted. *Clark* v. *Clark*, 8 Paige, 153. On a bill filed against an executor, seeking to charge him in respect of *devastavits* committed by his co-executor, who had died, the defendant by his answer denied, that he had ever interfered in the testator's affairs in the lifetime of the executor, and it was admitted that he had not proved the will until after the death of that executor: it was held nevertheless upon the evidence of two witnesses, speaking to different facts, but corroborated by circumstances, more especially by the fact of a composition deed having been executed by the surviving executor with the executor of the deceased, that there was a sufficient ground for inquiring into the acts of the surviving executor; and the court accordingly directed special inquiries on the subject. *James* v. *Frearson*, 1 Yo. & Coll. C. C. 370.

accounts, when the error had been admitted and corrected long before the filing of the bill.

THE MASTER OF THE ROLLS stated, that the question was, whether, where an executor, after a settlement of accounts, confesses there was an error in the accounts, and, before suit, corrects it and pays over the amount, and a bill is afterwards filed to surcharge and falsify the accounts, the error, so corrected before suit, is a ground upon which the court can make a decree to [*68] surcharge and falsify: and his honor held, that it was not a *ground upon which the court could make such a decree; for, at the time of the bill filed, there was, in this respect, no existing error, and no cause of complaint by the plaintiff.

In this clause, also, the Master of the Rolls ruled, that, if the plaintiff read a passage in the defendant's answer as evidence of a particular fact, the defendant had no right to read, as evidence, any subsequent matter, although it might be connected with the passage which the plaintiff had read by such words as "but" and "and," unless the subsequent matter was explanatory of the passage read by the plaintiff.[1]

[*69] *BOZON *v.* BOLLAND.

ROLLS.—1829; December 3.

Where a person, not a party to the suit, is interested in a question, and appears by counsel, and submits to be bound by the decision, the court will not hear him, without the consent of the other parties to the suit.

IN this case a question arose, whether the assignees of Rowe, a bankrupt, who were not parties to the cause, had not an interest in the subject of the suit.

At an adjourned hearing of the cause, Mr. *Rose* appeared for Rowe's assignees, and was ready to argue the point on their behalf, and to be bound by the decree, in the same manner as if they had been parties on the record.

THE MASTER OF THE ROLLS stated that he could not hear them, although they might consent to be bound by his decision, unless all the other parties to the suit gave their consent.[2]

[1] Vide *Bartlett* v. *Gillard*, 3 Russ. 149, 157, n. 2. *Nurse* v. *Bunn*, 5 Sim. 225.

[2] If a person who is named as a defendant, but has never been served with a subpœna, or appeared to the bill, appears by counsel at the hearing, and consents to be bound by the decree, the defect is cured. *Capel* v. *Butler*, 2 Sim. & Stu. 457. "If a party is named as a defendant on the record, he may if the plaintiff consents, enter his appearance with the registrar at the hearing; but where he is not named as a party, the court cannot, without the consent of all the parties to the suit, allow him to appear at the hearing, and submit to be bound by the decree."—Shadwell, V. C. *Attorney General* v. *Pearson*, 7 Sim. 302. See *White* v. *Hall*, post, 332. *Young* v. *Everest*, post, 426. *Cocker* v. *Quayle*, post, 539. *Capel* v. *Butler*, 2 Sim. & Stu. 457.

That consent was not given, and the cause stood over, with liberty to the plaintiffs to file a supplemental bill.

Mr. *Bethell*, for the plaintiffs.

Mr. *Bickersteth* and Mr. *Koe*, for the principal defendants.

Mr. *Barber*, for other defendants.

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*KNIGHT *v.* MARTIN. [*70]

ROLLS.—1829; December 7.

A trustee, refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive.

A BANKRUPT was entitled, under a will, to a contingent legacy of 2000*l.* after the death of his mother, to whom it was given for life. The mother died, and his interest became absolute. His assignees then applied to the trustees under the will for payment of it; but they declined to pay it without the direction of a court of equity, solely because the bankrupt set up a claim to it.

The question was as to the costs of the suit, which the trustees had thus compelled the assignees to institute for the recovery of the legacy.

Mr. *Bickersteth* and Mr. *Booth*, for the plaintiffs.

Mr. *Pemberton* and Mr. *Palk*, for the trustees, declined to argue that the reversionary legacy did not pass to the assignees, but submitted that, as the trustees had been entangled between conflicting claims in consequence of the bankrupt insisting that he was entitled to the legacy, they ought to be indemnified out of the fund.

THE MASTER OF THE ROLLS:—If it be possible to assign any reasonable ground for the refusal of the trustees to act without the direction of the court, it is for the interest of the public that the costs of the trustees should be paid to them. If the trustees had taken the trouble to consult any professional person, they must have been advised that the *claim of the bank- [*71] rupt afforded no color for declining payment of the legacy to his assignees. They may, however, have acted from mere ignorance, and not from any improper motive, and, therefore, though I will not give them their costs, I will not make them pay the costs of the plaintiffs.[1]

[1] Vide *Campbell* v. *Home*, 1 Yo. & Coll. C. C. 664.

Harrison v. Harrison.

Rolls.—1829; December 7.

Where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase money, is an interest in land, within the statute of mortmain; and the purchase money will not pass by his will to a charity.

A testator bequeathed "to the two sons and the daughter of A. B. 50*l.* each:" at the date of the will and the death of the testator A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50*l.*

In this case the testator had entered into a contract to sell a part of his real estate, but no steps had been taken to carry the contract into effect during his life, nor had any part of the price been paid. A question was made in the cause, whether, as the contract was completed after his death, the purchase money would pass by the will to a charitable use.

Mr. *Wray* on behalf of the crown, contended, that the purchase money would pass as part of the fund which had been given to certain charities. In equity, the testator had, at the time of his death, ceased to be the owner of the land; all that he was entitled to was a sum of money, which, if he had died intestate, would have belonged to his administrator and not to his heir at law. This money was not land; neither was it to be laid out in the purchase of land: it therefore did not come within the 9 G. 3, c. 36.

Mr. *Bickersteth* and Mr. *Jeremy*, contra:—The statute of mortmain provides, that no lands "shall be in any way charged for the benefit of
[*72] any charitable use;" and, accordingly, it has been uniformly *held to apply to money secured by mortgage; though the mortgage debt is mere personal estate, and would go to the executor of the mortgagee. A vendor, who has contracted to sell an estate, but has not received the purchase money has an interest analogous to that of a mortgagee: both have the legal estate in the land, subject to an equity which imposes on them the obligation of conveying the land upon receiving a certain sum: and neither can be compelled to part with the legal estate, except on receipt of the money. The interest, therefore, of the vendor in the purchase money is an interest so connected with land as to come within the operation of the statute.

The Master of the Rolls ruled, that the lien of the testator upon the land for the amount of the purchase money, was an interest in land under the statute of mortmain.

By the will, the testator bequeathed, "to the two sons and the daughter of Thomas Lovell, 50*l.* each."

The master found, that, at the time of making the will and of the death of the testator, Thomas Lovell had five children living, namely, one son and four daughters,—and not two sons and one daughter.

The following cases were cited:—*Tomkins* v. *Tomkins*,(*a*) *Scott* v. *Fenoulhett*,(*b*) and *Garvey* v. *Hibbert*.(*c*)

THE MASTER OF THE ROLLS held, that each of the five children was entitled to a legacy of 50*l*.[1]

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*BAILY *v.* TAYLOR.[2] [*73]

ROLLS.—1829; December 10, 11.

A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction; and then the account will follow.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years.

IN 1824, the plaintiff filed his bill for an injunction to restrain the defendant from publishing the second and third editions of a work in which he had copied thirteen tables of calculations as to the value of leases and annuities, which had been pulished by the plaintiff in three works—one printed in 1802, another in 1808, and the third in 1810: and the bill also prayed an account.

The first edition of the defendant's work was published in 1811; and the plaintiff admitted that he had licensed that edition, on condition that the defendant acknowledged in his preface, that he had copied some of his tables from the plaintiff's works. The defendant published a second edition in 1820, and a third edition in 1823.

In December, 1824, soon after the filing of the bill, the plaintiff moved before the Master of the Rolls, who was then Vice-Chancellor, for an injunction to restrain the publication of the defendant's work. The motion was refused, upon the ground, that the tables, complained of as pirated, formed a very inconsiderable part of the plaintiff's work, and could be calculated by any competent person in a few hours: and also, on the ground of the length of time which had elapsed since the publication of the second edition of the defendant's book.

Notwithstanding the refusal of the injunction, the plaintiff proceeded with his cause, and brought it on to a hearing.

(*a*) 19 Ves. 126. in the notes. (*b*) 1 Cox, 79. (*c*) 19 Ves. 125.

[1] A testator gave a rent charge to trustees during the life of A. B. and her five daughters in trust, to pay it to A. B. for life, and after her death upon "trust for her said daughters, and the survivors and survivor, and while more than one should be living to be divided between them in equal shares." A. B. had five sons, and one daughter only; it was held, that subject to the life interest of A. B. her only daughter was entitled to the entire rent charge. *Lord Selsey* v. *Lord Lake*, 1 Beav. 146.

[2] S. C. Taml. 295.

[*74] *The defendant proved that the successive editions of his book had been regularly and openly advertised and sold: and an actuary, who was examined on his behalf, stated, that, in his judgment, 7*l.* 19*s.* would be a fair and reasonable charge for re-calculating and furnishing in manuscript the tables which had been borrowed from the plaintiff's works.

A fourth edition of the defandant's book had been published in 1825, and a fifth, in 1828.

Mr. *Bickersteth* and Mr. *West*, for the plaintiff.

Mr. *Fonblanque* and Mr. *Wakefield*, contra.

On the opening of the cause, the MASTER OF THE ROLLS desired the counsel of the plaintiff to consider, whether, if they failed in showing that they were entitled to an injunction, the court could make any decree, except for the dismissal of the bill; and the hearing stood over, in order that they might look into authorities on that point.

When the cause came on again, the counsel for the plaintiff contended, that, as there had been a piracy of a part of the plaintiff's work, he was entitled to protection for the future, and that the amount of the past injury ought to be ascertained, either by a reference to the master, or by directing an issue. The defendant had made profit by publishing that which was in truth the property of the plaintiff; and to an account of these profits the plaintiff was entitled; for, without an account, there would be no means of assessing accurately his damages at law.

[*75] *On the other hand, it was insisted, on behalf of the defendant, that the grounds, on which the court had refused the motion for the injunction, were equally valid against awarding an injunction by the decree. These grounds were, the length of time during which the plaintiff had acquiesced in the alleged piracy; the very small proportion, which the tables said to be pirated bore to the whole mass of the plaintiff's and defendant's respective books; and the facility with which the defendant might acquire a title to the tables which were the subject of complaint. If the plaintiff had sustained any injury, he might seek compensation by an action at law; if he thought that an account of the proceeds of the sale of the defendant's work would be necessary or useful in that action, he might file a bill for a discovery; but where he failed in establishing his right to equitable protection by means of an injunction, why should the jurisdiction, in a matter which related merely to the invasion of a legal right, be transferred from a court of law to a court of equity?

The following cases were cited:—*Dodsley* v. *Kinnersley*,(*a*) *Barfield* v. *Nicholson*,(*b*) *Whittingham* v. *Wooler*,(*c*) *Mawman* v. *Tegg*,(*d*) *Cary* v. *Kearsley*.(*e*)

THE MASTER OF THE ROLLS:—This court has no jurisdiction to give to a

(*a*) Amb. 403. (*b*) 2 Sim. & Stu. 1. (*c*) 2 Swans. 428. (*d*) 2 Russ. 385. (*e*) 4 Esp. 168.

plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.[1]

*I agree, that, although the plaintiff failed, upon the answer of the defendant, to obtain an injunction, he is at liberty to claim it at the hearing. The question, then, is, whether the court ought to grant an injunction as the case now appears? Considering the very inconsiderable part of the defendant's work which is complained of, and that this may be calculated in a few hours, so as to give the defendant an unquestionable right to its republication; and considering the difficulty, which would be imposed upon the master, if an account were directed, of ascertaining what part of the defendant's profit ought to be attributed to the plaintiff's tables; and considering also the distance of time at which the injunction is now sought, being nine years after the publication of the defendant's second edition,—I am bound to refuse the injunction, and to leave the plaintiff to seek his remedy at law; and the injunction being refused, there can be no account. The bill must, therefore, be dismissed, and with costs.[2] [*76]

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*Brown v. Brown. [*77]

1829; June 1, 4.

Under the 18th of the new orders, publication may be enlarged on affidavit, without notice.

Mr. Wakefield, on behalf of the defendant, moved to enlarge publication. No notice of the motion had been given; but there was an affidavit stating the ground on which the application was made.

The Vice Chancellor was of opinion, that, under the eighteenth order,(a) publication could not be enlarged, except on a motion of which notice had been given; and he refused to make the order.

The motion was renewed before the Lord Chancellor.

Mr. *Wakefield*, in support of the application, stated, that the object of the eighteenth order was to prevent parties from enlarging publication unnecessarily; and this purpose was accomplished by requiring them to state by affidavit the ground of the application. It was a mistake to suppose, that, if it was necessary to support an application by affidavit, notice of it must therefore be given: for there were many species of petitions which required to be

(a) "That publication shall not be enlarged, except upon special application to the court, supported by affidavit, and at the cost of the party applying, unless otherwise ordered by the court."

[1] Vide *Parrott* v. *Parrott*, 3 Myl. & K. 642.

[2] Vide *Sheriff* v. *Coates*, post, 159. *Bacon* v. *Jones*, 4 Myl. & Cr. 433. 2 Sim. & Stu. 10, n. 1. *Saunders* v. *Smith*, 3 Myl. & Cr. 630.

verified by affidavit before an order could be made upon them, but which were never served; and, in this respect, there could be no difference between applications by motion and applications by petition. There was nothing in the language of the eighteenth order, which made it necessary to give [*78] notice *of a motion to enlarge publication. The explanatory paper,(a) annexed to the report of the chancery commission, contained a comment on the fifty-third proposition of the commissioners, which proposition had been adopted and embodied in the eighteenth order; and from that comment it appeared, that one principal object of the change was to diminish expense. But the expense would be increased enormously, if publication were never to be enlarged, except on notice to all the different parties in a cause.

The Lord Chancellor stated, that he should confer with the Vice-Chancellor on this subject.

June 4.—The Lord Chancellor made the order enlarging publication.

[*79] *Freme *v.* Best.

1829; November 4.

In general, under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on notice.

A motion to amend a bill which had been previously amended, was made before the Vice Chancellor on such an affidavit as is required by the thirteenth order, but without notice;[1] and, in support of it, the decision of the Lord Chancellor in *Brown* v. *Brown*(b) was referred to.

The Vice Chancellor was of opinion, that the language of the thirteenth order was so different from that of the eighteenth, that the construction put upon the latter could not furnish a rule for the construction of the former. The thirteenth order specified one particular case, in which an order to amend might be obtained without notice; and that seemed to imply, that, in other cases, notice was to be given. The latter part of the order directed, that no leave to amend should be given "either without notice or upon affidavit," unless within a certain time; and the contrast, in which orders made upon affidavit and orders made without notice were here placed, led naturally to the inference, that orders made upon affidavit were not to be made without notice.

His Honor, therefore, declined to make the order.

Mr. *Koe* renewed the application before the Lord Chancellor; insisting

(a) Report of the Chancery Commission, p. 84. (b) See supra, 77.

[1] As to the motion before the Vice Chancellor, see, 3 Sim. 152.

upon the great expense which would be occasioned by the appearance of all the parties in a suit upon every motion to amend.

*The Lord Chancellor was of opinion that he could not make the [*80] order upon motion without notice; but stated he would take the subject into consideration.

On a subsequent day, his Lordship refused to make the order.

Smith v. Evans.

1829; November 24.

Formal amendments will be permitted to be made, without notice, though the bill has been amended previously.

The bill had been previously amended under a common order, and Mr. *Wakefield*, upon such an affidavit as is required by the thirteenth order, now moved for leave to amend a second time without notice. The proposed amendments were merely formal; consisting in making the addition of "younger" and "elder" to the names of two of the defendants.

In support of the application, Mr. *Wakefield* referred to the construction which had been put on the eighteenth order in *Brown* v. *Brown*;(*a*) and he stated, that the present motion, if made upon notice, would occasion an expense of from 20*l.* to 30*l.* He observed, that the words of the thirteenth order no where positively enjoined notice, but seemed to leave a discretion to the court: and he contended, that it never could be the intention of the framers of the new orders, to make the giving of notice imperative, where the proposed amendments were merely clerical, or where the costs would be excessive.

*The Lord Chancellor granted the application; stating, that, in [*81] making the order without notice in the present instance, he proceeded upon the circumstance, that the proposed amendments were merely formal.(*b*)

His Lordship at the same time expressed his opinion, that some course ought to be adopted, in order to lessen or avoid the great expense occasioned by requiring motions for leave to amend, after a first amendment to be made upon notice.

(*a*) See supra, p. 77.

(*b*) The twenty-eighth proposition of the commissioners, which was the basis of the thirteenth order, did not extend to the case of formal amendments.

Cottingham v. Potts.

1830; February 1.

A second order, giving the plaintiff leave to amend, made upon an *ex parte* application.

Some of the defendants to the original bill stated by their answers, that thirteen persons who were named, and other persons not named, were interested in the premises which were the subject of the suit. The bill was amended by making these thirteen persons parties, and by calling on the defendants to the original bill, to set forth the names of the other persons who had any interest in the premises, and the particulars of their respective interests. The answers to the amended bill gave information, which rendered it necessary to add various incumbrancers as parties. There were already twenty-seven defendants.

A motion was now made, *ex parte*, for leave to amend by making
[*82] these incumbrancers defendants. It was *supported by an affidavit of the solicitor of the plaintiff, stating that the proposed amendments were material, were settled and signed by counsel, and were not made for the purpose of delay or vexation; and that the first information, which he, or, as he believed, the plaintiff, had, of the interests which made the amendments necessary, was derived from the answers to the amended bill.

The *Solicitor General* and Mr. *Sharp* submitted, that leave to amend ought in such a case to be given *ex parte*, whatever might be the construction which would, in ordinary cases, be put on the thirteenth order. If notice were given, it was impossible to doubt that the order would be made; and the only effect of giving notice would be to create costs to an enormous amount, as upwards of twenty parties, represented probably by as many different solicitors, would in that case appear on the motion.

The Lord Chancellor made the order *ex parte*.

[*83] *Fellowes v. Lord Gwydyr and Page.

1829; November 13, 16.

It is no defence to a bill for specific performance by the vendor, that during the treaty he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.

The material facts of this case are stated in Mr. Simon's Reports, vol. i, p. 63.

The defendant Page appealed from the decree of the Vice-Chancellor.

Mr. *Horne* and Mr. *Keene*, for the plaintiff Fellowes, argued, that though the written agreement purported to be signed by Fellowes on behalf of Lord

Gwydyr, it was manifest from the evidence in the cause, that the defendant Page knew, or at least might have known, that the plaintiff was really the principal in the transaction. But whether the defendant did, or did not know it, that circumstance could make no possible difference since no loss would be shown to have accrued to the defendant from his ignorance, and no improper motive for concealment, if any had been practised, could be imputed to the plaintiff. At all events, the defendant Page, by taking possession of the articles contracted for, and proceeding to sell them off after he was fully informed of the truth, must be considered to have acquiesced, and to have waived any objection on the ground of mistake or misrepresentation. It would be too much for him now, after the bargain had been carried into effect, to turn round on the plaintiff, because the speculation had proved a losing one, and attempt to repudiate the contract, while he retained at the same time in his hands a large portion of the purchase money, as well as the whole produce of the sale.

*Mr. *Bligh* for Lord Gwydyr, who disclaimed all interest in the [*84] matters in question, stated, that his Lordship gave the plaintiff no authority to use his name, and took no part himself in the negotiation.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Warry*, for the defendant Page, contended, that upon the whole of the evidence, a case of deliberate and systematic fraud on the part of the plaintiff had been sufficiently established. It was plain that a series of artifices had been resorted to for the purpose of keeping Page in the dark as to the real nature of the transaction; all leading him to believe, that he was dealing with Lord Gwydyr through the agency of Fellowes, when, in point of fact, Fellowes was negotiating solely on his own account. What else could be the plaintiff's object in affixing his signature to the contract, in the name and as the agent of Lord Gwydyr,—in holding the meetings, at which the terms of the purchase were arranged, at the office of his Lordship's solicitor,—in permitting that solicitor to propose alterations as to the time of payment, and submitting the agreement to him for his approval,—in using language throughout the whole of his correspondence which would naturally confirm the defendant's original impression, that the plaintiff was only acting by his Lordship's direction, and which was in truth capable of no other rational construction?

That Page himself was imposed upon was obvious from the circumstances, that the first check he gave the plaintiff, in part payment of the purchase money, was drawn payable to Lord Gwydyr. On any other supposition, indeed, his conduct would be most strange and unaccountable; since, if he had been aware, as it had been insinuated he was, that his Lordship was no party to the sale, was it likely he would have rested satisfied *with [*85] a contract, in which he was himself the only person that was bound?

His subsequent conduct, however, abundantly proved that he did not so understand it. The instant he discovered his mistake, he exclaimed against the deception that had been practised upon him, and did every thing he could to escape from its consequences.

THE LORD CHANCELLOR observed, that he thought it sufficiently made out, that the effect of the plaintiff's conduct had been to mislead Mr. Page.

For the defendant:—Here then we have proved an industrious suppression and misrepresentation, which had the effect, whatever was the object, of misleading the defendant as to a most important ingredient in the contract as to the person, namely, with whom he had really contracted; and it is too late to contend now, after the cases of *Phillips* v. *The Duke of Bucks*,(*a*) *Harding* v. *Cox*,(*b*) *Eyre* v. *Popham*,(*c*) and other cases, the authority of which has been expressly recognized by Lord Eldon in *Bonnet* v. *Sadler*,(*d*) that wilful concealment, and *a fortiori* misrepresentation, upon so material a point, will not of itself be sufficient to avoid the agreement in equity. It matters not with what object, whether fraudulent or otherwise, the misrepresentation was employed, or whether it was intentional or not. The simple fact of misrepresentation alone, more especially if, as here, it succeeded in misleading the defendant, has always been considered a decisive answer to a bill for specific performance.

[*86] *In reality, however, there was a motive, and that an obvious and most improper one, for the course adopted by the plaintiff: and even if its existence were not fully made out in evidence, we should have a right to infer it from his conduct; for wherever a contracting party, during the progress of the treaty, studiously suppresses or misrepresents circumstances; wherever, by falsehood, he induces error in the mind of the other party, he will be presumed to have so acted for purposes of fraud, unless he can satisfactorily rebut the presumption. The defendant Page, as the plaintiff well knew, had been long connected with the family of Lord Gwydyr. He had been emplyed, in the way of his trade, by his lordship's father to sell the fittings-up of Westminster Hall after the trial of Lord Melville; he had claims against the late lord's personal representatives, to a large amount, outstanding and unsettled, and independently of the hope of something like a set-off, (which appears only by the answer, and which strictly perhaps, could not be made available against the present lord,) he was naturally desirous to keep up his connection with a powerful nobleman, whose patronage was well worth some sacrifice, by catching, even improvidently, at a contract which, if it did turn out an unprofitable bargain, his lordship, he felt assured, was too generous to enforce to the utmost letter. None of these inducements would have influenced his mind, in dealing with an obscure individual and a stranger, like Mr. Fellowes; and Mr. Fellowes of course, by carrying on the negotiation under cover of Lord Gwydyr's name, really obtained all the additional advantage estimated in money, which such considerations gave to the transaction in the eyes of Mr. Page. It is therefore, no more than a reasonable inference, that Page, if at all, would not have contracted with the plain-

(*a*) 1 Vern. 227. (*b*) 1 Vern. 227, n. (*c*) 1 B. C C. 95, n.

(*d*) 14 Ves. 526. Some other cases are mentioned in Sugden's Vendors and Purchasers, 200, 201. 7th edition.

tiff on the same terms—the terms now sought to be enforced—as he *did when he acted under the impression that he was dealing with [*87] Lord Gwydyr.

The jurisdiction of courts of equity to compel the specific performance of agreements, is a matter purely discretionary: and in the exercise of that discretion it has always been a rule, that the party seeking equitable relief must come with clean hands. The misconduct of a plaintiff operates as a personal disqualification, which the court invariably notices, and of which the defendant may avail himself as a bar to the demand,(*a*) without being called upon to show that he has sustained any special loss or injury in consequence. Here it is admitted, that Fellowes was guilty of studied duplicity, which had the effect of deceiving the defendant, and which, we are entitled to assume, was intended to deceive him. Can a plaintiff, under such circumstances, be permitted to claim the extraordinary relief, which, in an honest case, the court will give by decreeing the agreement to be specifically executed, or will it not rather leave the parties to proceed at law? It is said, that, in this instance, no relief could be had at law, because the contract was signed in the name of Lord Gwydyr, who, having taken part in the transaction, now refuses to lend his name to any legal proceedings instituted with a view to carry it into effect. But that only furnishes a stronger reason why this court should decline to interfere. The plaintiff either had, or had not, a right to make use of Lord Gwydyr's name. If he had, this court would compel his Lordship, on a bill filed for that purpose, to allow an action to be brought in his name, on behalf of the *plaintiff. If he had not, (and that such was [*88] the fact, appears from the statement of his own bill,) it is a further instance of the plaintiff's unfair and dishonest dealing, which would of itself deprive him of any title to equitable aid.

The contract, besides, has no mutuality. If Lord Gwydyr or Mr. Fellowes had refused to perform it, Mr. Page, it is clear, however fairly and openly he might have acted, could never have enforced it specifically against either, but must have resorted for relief to a legal tribunal. In truth, the suit here is altogether improper. It prays a specific performance, though, in the events that have since occurred, the articles having been sold off, and a portion of the price paid, performances can consist in nothing more than paying the balance of the purchase money. In other words, it calls upon the court to invade the province of a jury, and assess the damages which the plaintiff has sustained by Page's refusal to complete his bargain. It is unquestionable, that, if the contract had been originally drawn in the name of Fellowes himself, as common sense and plain dealing would have dictated, its subject matter is of such a kind, it being for payment of money on the one hand, and for delivery of goods on the other, that the vendor could never have come here for assistance, but must have been left to make the most of his legal remedy.

(*a*) See on this subject the observations of Sir T. Plumer, M. R., in the cases of *Clermont* v. *Tasburgh*, 1 J. & W. 119, and *Woodhouse* v. *Meredith*, ib. 223.

And is he to be actually placed in a better situation—is the more powerful arm of a court of equity to be extended to him, merely because, through folly, or fraud, he has framed the contract in a way which deprives him of that remedy? . Such a principle, once admitted, would be a direct encouragement to negligence and deception; every blundering agreement of every [*89] petty tradesman with the wholesale dealer who *supplies his stock, might be made the foundation of a suit in chancery; and the line of separation between the two jurisdictions would be totally destroyed.

Mr. Page never acquiesced in the transaction, after he became acquainted with the facts. He was compelled, for his own safety, to proceed to sell off the articles without delay, that the hall might be cleared by a certain day, according to the terms of his undertaking to Lord Gwydyr. But so far was he from thereby intending to waive his objections to the contract that every thing he subsequently did was under protest. He kept a regular account of the proceeds of the sale, which he is ready to produce and verify; and he is willing to pay over the amount to the plaintiff, after deducting the sum he has already paid, and the usual allowance for his commission as a broker on the sale.

The Lord Chancellor:—Mr. Page, I am satisfied, had every reason to believe that he was contracting with Lord Gwydyr: but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause which can lead me to suppose, that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1500 guineas, had he been aware of the party who was really the owner of the property. It was strongly pressed upon me in the argument, that the parties should be left to proceed at law. But from the situation in which they respectively stood, as well as from the form of the agreement, they could not have obtained an effectual adjudication upon their rights at law, and it was necessary for the plaintiff therefore to come into this court. Mr. Fellowes says, that the name [*90] of Lord Gwydyr was not used for any improper *purpose; but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract, without showing that the deception had in some way operated to his prejudice.

Decree affirmed without costs.[1]

[1] Vide *Bacon* v. *Bronson*, 7 Johns. Ch. Rep. 201. *Scott* v. *Hanson*, post, 128. S. C. 1 Sim. 13, 15, n. 1. *Harris* v. *Kemble*, 1 Sim. 111. *Stainbank* v. *Fernley*, 9 Sim. 556. *Sedden* v. *Connell*, 10 Sim. 86.

Fraser v. Byng.

1829; November 16.

Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter, to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional.

The will of John Byng, Esquire, made during his residence in India in the service of the East India Company, and bearing date the 21st of April, 1808, after appointing executors, proceeded in the following terms:—"I give and devise to my natural daughter, Cecilia Georgiana, now under the care of my dear sister Mrs. Fraser, the sum of 5000 pagodas, placed in the hands of Messrs. Harrington & Co. a company's bond bearing 8 per cent., and with whatever interest may be due upon the said bond; and the said executors on no account to call upon Mrs. Fraser for any sum or sums disbursed upon the education of the child under her protection. Item, I give and devise unto my natural child John, under the care of Mr. Griffiths, of Madras, the sum of 1000*l.* or 2500 pagados; I give and devise to my dear wife, Eliza Amelia Byng, after paying any debts and legacies, the residue and remainder, entirely to go to my dear wife, which I suppose to amount to 30,000 pagodas, besides the bond due to me by Messrs. Chase & Co., and other debts from various persons, amounting to about 3000 pagodas more. If any accident should befal my dear wife, the whole of my property to my child George Percy Byng; but if she *lives, the whole of my proper- [*91] ty to be entirely and solely at her disposal."

The testator afterwards, when at Trichinopoly, executed another testamentary paper, bearing date the 19th November, 1811, which was, in part, in the following terms:—"I, John Byng, of, &c., do hereby add the following clauses to my last will and testament. As some mistakes may occur regarding the 2000*l.* sterling bequeathed to my natural daughter Cecilia, this is to state that 1000*l.* sterling of the above sum is in the hands of the honorable Mrs. Hopwood, and about 800*l.* sterling is in the hands of my brother George Byng, Esquire; now if any difference should be wanting to make up the aforesaid principal sum of 2000*l.* sterling, I will that the residue wanting is to be taken from the aggregate of my fortune, and the aforesaid sum of 2000*l.* sterling so completed is to be paid into the hands of Captain Percy Fraser, in trust, for the use of my aforesaid natural child, Cecilia, to be paid to her on her attaining the age of twenty-one years, or on her marriage, should she marry before attaining that age, together with any interest that may have accumulated thereon, after deducting the expenses of her education and support. I also bequeath to my natural son, John, under the care of Mr. Griffiths, at Madras, the sum of 1000*l.* sterling, to be paid to him on his attaining the age of twenty-one years, with any interest that may have accrued thereon, after deducting the expenses of his education and support; but I do hereby will, that, in the event of my aforesaid natural child, Cecilia, dying before her

marriage, or her attaining the age of twenty-one years, the aforesaid sum of 2000*l.*, with any interest that may have accrued thereon, is to revert to my lawful children. I also will that, in the event of my natural son, John, [*92] dying, before he has attained the age *of twenty-one years, the aforesaid sum of 1000*l.*, with the interest that may have accrued thereon, is also to revert to my lawful children. I further will, that the yearly interest arising from the aggregate sum, of which I may be possessed, or which may hereafter devolve to me, after the several legacies are paid, shall be paid by regular instalments to my dearly beloved wife, Amelia Byng, for her own use and for the education of my lawful children, to be enjoyed by her during the term of her natural life, but in the event of her death or her again marrying, the whole yearly interest to be laid out, or such part as may be necessary, for the education of my lawful children, and the principal, with the interest that may remain thereon, if any, to be divided amongst them in equal shares, the several shares to be paid them on their respectively attaining the age of twenty-one years."

The rest of this instrument, which contained no further bequests, had reference principally to the nature and particulars of the testator's property; and it gave directions to certain of his friends in India, whom he requested to undertake the management of his affairs, as to the mode in which his outstanding effects were to be collected and applied. It also appointed guardians for his lawful children, and spoke of what he had done by his former will, and of "these clauses added to his last will and testament." There was no new nomination of executors.

The testator died in 1812, and probate of the two testamentary papers as a will and codicil was granted by the ecclesiastical court to G. P. Fraser, one of the executors.

Sometime afterwards, a bill was filed for the purpose of having the [*93] accounts taken, and the necessary funds *raised and set apart for the payment of the different legatees. By the decree in the cause bearing date the 2d of May, 1818, and pronounced by Sir John Leach, then Vice Chancellor, it was (among other things) declared that the legacy given by the codicil to the appellant, John Byng (the natural son of the testator,) was a revocation of the legacy of 1000*l.* given to him by the will, and was not accumulative. At the date of the decree, John Byng was an infant, and when he came of age, several years after, the order he obtained for payment of the sum which had been appropriated to answer his legacy of 1000*l.* was made without prejudice to any proceedings he might be advised to take with a view to get the decree varied. And he now appealed against so much of the decree as declared the second to be a revocation of the first legacy, and not an addition to it.

Mr. *Horne* and Mr. *Phillimore*, for the appellant:—The general rule is, that, when a legacy is given by a will, and another is afterwards given by a

codicil, to the same person, the testator is held to have intended that the legatee should take both, unless strong circumstances appear on the face of the instruments themselves, raising an opposite presumption. Here, however, there is nothing of the kind; on the contrary, the probabilities, as far as they can be collected, pointed directly the other way. This second instrument is no more than a codicil, or as the testator himself styles it, "clauses added to his last will and testament," and it is clear from its tenor, that it was written while the first was lying before him, or at least was fully present to his mind. He commences it by anxiously explaining his wishes (which he was afraid might be misunderstood,) with respect to the sum he had already bequeathed to his daughter, and then having that prior bequest, and no doubt also the bequest which he had made to the appellant his son, [*94] in his recollection, he proceeds in these terms:—"I also bequeath to my natural son, John, the sum of 1000*l.* sterling, to be paid to him on his attaining the age of twenty-one years." Nothing can be more distinct or explicit. The testator knew that he had by his will, bequeathed 2000*l.* to his daughter; by the codicil, he gives directions to his executors with regard to the funds to be applied in payment of that sum, expressly referring to it as the identical sum given by his will. He knew, too, that he had bequeathed 1000*l.* to his son. But in the codicil he makes no reference whatever to that legacy, and goes on to use words of bequest to him, which can import only a new, substantive, and independent gift. What can be the reason of this marked diversity? Simply, that the testator's object was different in the two cases. He intended merely to regulate the property which the daughter was to take, but he wished to make a reasonable addition to the fortune which he had bestowed upon his son. Two thousand pounds he probably considered an ample provision for a girl living under the care of her paternal relatives; but half of that sum, he justly thought, was a scanty allowance for a boy who had to make his way in the world, and who would require almost the whole of it as an advancement to start him properly in life. He was therefore naturally desirous to put both children on an equal footing. His fortune had increased considerably in the interval between the date of the two instruments, as appears from the latter, so that he could indulge his inclination without inconvenience; and he has accordingly effected his purpose in the codicil, by which he distinctly gives 1000*l.* to his son, well aware all the while that he had previously given him a similar sum by the will. If he had intended the subsequent as a substitution for the former legacy, he would certainly have said so; [*95] more especially as his attention was directly drawn to the circumstances in which the son stood, by the reference, in the immediately preceding sentence, to the provision he had made for the daughter, in whose case, as he meant to bestow no additional bounty, he took care to use language that imported none.

Each of the two instruments, taken separately, is defective. In order to

collect from them the complete expression of the testator's mind, we must view them in connection, as forming one entire testamentary act, and they will then appear perfectly consistent and explicit. Reading them in that way, their effect may be thus rendered :—" I give to my daughter 2000*l.* absolutely ; —on second thoughts, it had better be conditional only, and be paid, when due, out of such and such funds. Item, I give to my son 1000*l.* absolutely : —I also bequeath to him 1000*l.*, to be paid at twenty-one, in the event of his attaining that age, otherwise to go over." Here we see the force of the word " *also*," which plainly shows the testator meant an addition.

It will be said, that the sums given in the will and the codicil are the same in amount : but that circumstance, by itself, is not sufficient to raise a presumption that the one was intended in substitution for the other. *Ridges* v. *Morrisson*,(*a*) and the cases there referred to. *Baillie* v. *Butterfield*.(*b*). If, however, such a presumption could for a moment be admitted, it would be effectually repelled by considering the very different character of the [*96] two legacies. The one is an abolute gift, vesting immediately, *and the principle of which was of course applicable, either wholly or in part, to the boy's advancement. The other is conditional only, to vest on his attaining twenty-one, and, in the event of his dying under that age, to go over to the lawful children of the testator. It is a fund which could not by possibility be broken in upon while the contingency lasted, not even for the necessary purpose of putting him out in trade or instructing him in a profession. The two legacies, therefore, though nominally the same, are by no means equal in value : the latter being far less beneficial than the former, a circumstance which, in the case of *M'Kenzie* v. *M'Kenzie*,(*c*) Lord Eldon held to be quite conclusive in favor of accumulation. It is observable, too, that the codicil speaks of the surplus interest that might accumulate during the son's minority ; and no doubt a surplus might remain beyond what was requisite for his support and education, if both the sums were to be taken : but it is not to be supposed that the testator could have contemplated the possibility of such a surplus, after satisfying those purposes out of the interest of 1000*l.* According to the construction contended for on the other side, the appellant was to have, during his minority, the interest of only one sum of 1000*l.*. and not a shilling of the principal could be touched, not even to ensure his success in life, unless he attained twenty-one. That never could be the object of a considerate parent. According to our construction, the appellant would have the interest of 2000*l.* to be employed towards his maintenance and education, and one half of that sum would be applicable at the discretion of his trustees, and under the sanction of the court, to any advancement for his bene- [*97] fit, while the remainder would *be vested and payable as soon as he came of age, an arrangement at once natural and judicious. On the whole, unless this clause of bequest is to be read as a revocation, in contra-

(*a*) 1 B. C. C. 389. (*b*) 1 Cox, 392. (*c*) 2 Russ. 263.

diction to its express language, and in violation of every fair presumption of intention, the appellant is entitled to both the legacies.

Mr. *Kindersley*, contra :—Where the legacies are given *simpliciter*, and there is nothing to assist conjecture, the general rule in favor of accumulation may perhaps be admitted ; although where the legacies are equal in amount, even that has sometimes been denied.(*a*) But certainly the doctrine cannot be carried farther ; for the presumption is extremely slight, and any intrinsic evidence, supplied by the testamentary instruments themselves, is sufficient to turn the scale, and throw, on the party claiming the double bequest, the burden of supporting his claim by parol testimony. The general rule, therefore, is subject to an important exception, fully established by authority, and bearing directly on the present question, viz., that, wherever the testamentary papers contain a series of bequests, comprising the same property and corresponding pretty nearly in number and value, to a numerous class of legatees, there repetition and not accumulation shall be presumed. And this exception is founded in good sense ; for though it is possible enough for a testator to mean an addition, when by a codicil he simply gives a sum to the same individual who was to take a similar sum by his will, it is far less likely that he should repeat a whole line of bequests to a variety of legatees, *without the least reference to what the first instrument had done for [*98] them, unless he intended the second to be substituted for the first.

That principle was the foundation of Lord Hardwicke's decision in the *Duke of St. Alban's* v. *Beauclerk*.(*b*) In that case, legacies given by two distinct codicils to the same legatees, though they differed in amount, and though an annuity given by the one was not noticed in the other, were held to be substitutional. So in *Coote* v. *Boyd*,(*c*) where the second codicil appeared with some slight variations to be a mere repetition of the first, though both were proved in the ecclesiastical court, and it was not pretended that the one was meant to be a revocation of the other, Lord Thurlow decided that the legacies were not doubled. In *Attorney General* v. *Harley*,(*d*) there were two testamentary papers giving the same sum to the same individual, but with a material alteration in the terms and nature of the bequest, it being in the one absolute, in the other conditional, and yet that was held to make no difference, and only one legacy was allowed. *Barclay* v. *Wainwright* ;(*e*) *Gillespie* v. *Alexander*,(*g*) was the case of a will and codicil, and was in other respects very analagous to the present. The codicil in that case gave a variety of legacies ; some of them to the same, others to a less, and others to a larger amount (and so far it is a stronger case than ours,) and it nowhere pretended to revoke the prior testamentary paper ; nevertheless it was determined that the sums bequeathed to the same legatees were not addi-

(*a*) See the observations of Lord Thurlow in *Moggridge* v. *Thackwell*, 1 Ves. jun. 473, and of Sir W. Grant in *Benyon* v. *Benyon*, 17 Ves. 42.

(*b*) 2 Atk. 636. (*c*) 1 B. C. C. 448, and 2 B. C. C. 521. (*d*) 4 Madd. 263.

(*e*) 3 Ves. 462. (*g*) 2 S. & S. 145.

[*99] tional but substituted. The *case of *M'Kenzie* v. *M'Kenzie* may seem at first sight inconsistent with the others, but it is clearly distinguishable, for the codicil there not only positively recognized and confirmed the will in all other respects, but most of the sums bequeathed by it were different in value, and as to several in which the testator intended revocation, he expressly said so, thereby raising a strong implication that as to the rest he had no such intention.

The same principle ought to hold, perhaps even more strongly, in a case like the present, where the subsequent testamentary paper, though it cannot be said to repeat a *series* of bequests, does what amounts to the same thing, by embracing within the range of its bounty all the objects for which the prior instrument had provided. This professes indeed to be a codicil, but it is really a kind of supplemental will, having reference to the distribution of the whole of the testator's property. It takes up the former will as the basis of the proposed distribution, and proceeding as it were in parallel lines with it, explains and remodels the dispositions which that had made. It contemplates no new gift (unless the bequest to the appellant is to be so construed ;) for its single purpose is to modify and abridge, while, as to their general amount it ratifies the interests previously given. The second may, therefore, be considered as a substitution for the first instrument, except where, as in the instance of the daughter's legacy and the nomination of executors, it expressly confirms and adopts it. In each of them the testator divides his fortune into three portions. One of these he gives to his natural daughter; another to his natural son; and the third, the residue, comprising the great bulk of his property, to his wife and family. In the codicil he first considers the case of [*100] the daughter, and distinctly recognizing the sum which *he had already bequeathed to her, proceeds to regulate and qualify the gift. He then adverts to the legacy given to his son; and, as he had spoken and approved of the 2000*l.* bestowed on the daughter in the preceding clause, so, in the next, he repeats that he also gives to his son 1000*l.*, stating that he means it to be taken subject to the same conditions. The word "also" indicates naturally enough the transition of the testator's mind from the one bequest to the other, and it indicates no more. Finally, he addresses himself to the consideration of the residue, which had been left to his widow absolutely, or in the event of her death, to his only lawful child; and, without professing to revoke that disposition, he does, in effect, make a totally different distribution, bequeathing what he calls the aggregate of his property, after payment of the legacies, to the widow for life or widowhood only, with remainder among all his lawful children.

It is impossible not to perceive from this comparison, that the two instruments are commensurate, and that their several parts have a mutual relation, and the inference is natural and almost unavoidable, that, as far as the one overrides the other, they cannot stand together. To that extent the

codicil is virtually a revocation; the 1000*l.*, which it gives, is the same 1000*l.* which the will had previously given, and the consequence follows of course, that the legacies are not accumulative.

Besides, had the intention been different, here, why should the testator, when he was carefully guarding against the lapse of the daughter's portion, and of the 1000*l.* given to the son, by a bequest over to his lawful children, have neglected a similar provision with respect to the 1000*l.* mentioned in the will, if that was meant to *be a separate gift? The [*101] motive for the precaution, that the son was a natural child, and that otherwise the legacy would go to the crown if he died in infancy, would have applied with equal force to the first legacy as to the second, and yet when his attention is directly drawn to it by the reference to the daughter's situation under the will, he takes no notice of it whatever, a circumstance which proves beyond a doubt, that in the will and codicil he considered himself as speaking of one and the same sum. As to the alleged increase of his property, the codicil shows that his family had increased in at least an equal proportion. In every case of this kind the single inquiry is what did the testator really intend. For the purpose of ascertaining that point it is necessary to weigh all the circumstances, to place the instruments in juxtaposition, and to compare attentively the whole scope and import of each; and if we do so in this instance, we cannot fail to arrive at a conviction, that in the codicil the testator was merely repeating and not enlarging his bequest.

Mr. *Horne*, in reply.

The Lord Chancellor :—There can be no doubt, I apprehend, as to the general rule. The only question here is, whether there is sufficient to show that this codicil was intended to operate as a substitution for the legacy given by the will. My own opinion is, and has been from the first, that the codicil was intended as a substitution, or rather as a qualification of the will. [Here his Lordship stated the material parts of the will and codicil, and observed, that the latter ran over and reviewed the whole of the dispositions in the will.] The testator intended by the *codicil to give directions to [*102] qualify the different legacies. In the first place, he says, as to his natural daughter, the fund for the payment of her legacy has shifted, and he makes a provision for that circumstance. Then, in a subsequent clause, he qualifies the absolute gift to her, by saying, that, in the event of her dying under twenty-one and unmarried, her legacy shall go over. In precisely the same terms he next qualifies the legacy of 1000*l.* given to his natural son; and if he had intended that gift of 1000*l.* to be accumulative and not in satisfaction of the sum given by the will, no reason can be assigned why one-half only should be directed to go over. The principle of all the cases on this subject depends upon the question, whether you can collect from the whole of the instruments taken together, an intention on the part of the testator to substitute the one legacy for the other. I think you may, from the

circumstances in this case. The judgment of the court below ought, therefore, to be affirmed.(*a*)[1]

[*103] *CLARK *v.* DEW.

1829; November 18.

A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law.

A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause having reference to a distinct subject, though between precisely the same parties. *Semble.*

THIS was a motion, on behalf of the plaintiff Thomas Clark, for the appointment of a receiver of certain real property, to which he and his brother and co-plaintiff, Valentine Clark, claimed to be beneficially entitled, under the will of their deceased uncle Eli Stott. The bill was filed by the Clarks against the devisees in trust, and against the heiress at law, Mrs. Dew, and her husband, for the purpose of establishing the will, and carrying the trusts of it into execution, as far as related to the real estate of the testator; and it prayed an issue *devisavit vel non* to try the validity of the will, and that a receiver might be appointed in the meantime.

(*a*) Most of the authorities upon this subject have been collected by Mr. Geldart, in a note to the 6th volume of Maddock's Reports, p. 303, under the case of *Wray* v. *Field*, which is also reported on appeal in 2 Russ. 257. The subsequent cases are *Hemming* v. *Gurrey*, 2 S. & S. 311. *M'Kenzie* v. *M'Kenzie*, 2 Russ. 262. *Lord* v. *Sutcliffe*, 2 Sim. 273. The judgment of Sir John Leach, Vice Chancellor, in *Hemming* v. *Gurrey* was subsequently carried by appeal to the house of lords, and finally affirmed, by Lord Eldon. 1 Bligh, N. S. 479.

If the different instruments are exactly co-extensive in their provisions, and, in other respects, are so nearly identical as to satisfy the judge that they could never be intended to exist together, probate will be granted only of the latest in date, and the others will be held to be virtually revoked. *Methuen* v. *Methuen*, 2 Phillim. 416. And parol evidence will be resorted to, if necessary, to assist in determining the intention. Ib. But where testamentary papers, very similar in form, and embracing the same general range of objects, still present such discrepancies, that one cannot amount to more than a partial revocation, or repetition of the rest, the prerogative court allows all of them to be proved, and leaves it to courts of equity to exercise their own judgment on the question of addition or substitution, whenever those courts are called upon to construe their effect for the purpose of determining the rights of legatees. *Jackson* v *Jackson*, 2 Cox, 42. *Hemming* v. *Gurrey*, 2 S & S. 311. 1 Bligh, N. S. 479. And if the *prima facie* presumption in favor of accumulation is rebutted by internal evidence, drawn from a comparison of the language and contents of the instruments themselves, testimony becomes then, and not till then, admissible, either to fortify or overthrow the original presumption. *Hurst* v. *Beach*, 5 Madd. 359—361.

[1] See the following additional authorities, as to when a legacy is cumulative or substitutional; *Robley* v. *Robley*, 2 Beav. 101. *Spire* v. *Smith*, 1 Beav. 419. *Strong* v. *Ingram*, 6 Sim. 197. *The Attorney General* v. *George*, 8 Sim. 138. *Guy* v. *Sharp*, 1 Myl. & K. 589. *Martin* v. *Drinkwater*, 2 Beav. 215. *Watson* v. *Reed*, 5 Sim. 431. *Gordon* v. *Hoffman*, 7 Sim. 29, *Simon* v. *Barber*, Taml. 14. *Mackinnon* v. *Peach*, 2 Keen, 555. *Dent* v. *Bennett*, 7 Sim. 539.

*The defendants, Mr. and Mrs. Dew, by their answer admitted, that [*104] the supposed will had been duly executed according to the statute of frauds, but they altogether denied its validity, inasmuch as the testator was not, at the time of its execution, of sound and disposing mind, memory, and understanding. They further stated, that the property in question consisted merely of a slip or landing place at Rotherhithe, which was let at a rent of eighteen guineas a year, and that they had only obtained possession of it, after recovering judgment by default, in an action which they were compelled to bring against the trustees for the rent, and in which they alleged, the plaintiffs had an opportunity, if they had thought fit, of trying the validity of the will at law. Their answer also set forth at large the proceedings that had taken place in the prerogative court, and in the court of delegates, where the validity of the instrument, as a disposition of personal estate, had been long in litigation, and where it had been finally decided, by two successive judgments, that Eli Stott had died intestate as to his personal estate; and they relied on those proceedings, and on the result of an unsuccessful application afterwards, made to the Lord Chancellor for a commission of review, as sufficiently establishing the invalidity of the will, and the rights of the defendant, Mrs. Dew, as the testator's next of kin and heiress at law. They also stated, that the plaintiff Thomas Clark was a prisoner in the Fleet for contempt of the court of chancery, in disobeying certain orders made in a cause in which he was a defendant and these defendants were plaintiffs, and that his brother, the other plaintiff, was abroad and out of the jurisdiction.

The other defendants, the devisees in trust, by their answer admitted, that the testator was, as they believed, of sound and disposing mind, memory, and *understanding, and legally competent to make a will [*105] at the time when he executed the one in question.

Sir Charles Wetherly and Mr. *Roupell*, for the motion:—This motion is founded on the admissions contained in the answer of the defendant, and may be regarded as almost a matter of course. It is admitted, that the testator died seised of real estate, and that the defendants Mr. and Mrs. Dew are now in the receipt of the rents and profits of that estate. They say, indeed, although their co-defendants, the trustees, say directly the reverse, that they do not believe the testator was of sound mind at the time when the will was executed. But that is perfectly immaterial. Whether he was so or not, is not within the province of this court to determine; but will remain to be ascertained by the issue *devisavit vel non*, which must of necessity be directed. That has been the course, which, ever since the case of *Kerrich* v. *Bransby*(*a*) in the house of lords, this court has uniformly followed in dealing with questions respecting the legality of wills disposing of real estate. Nor does a

(*a*) 7 Bro. P. C. 437, Toml. ed. See also *Bates* v. *Graves*, 2 Ves. jun. 287. *Webb* v. *Claverden*, 2 Atk. 424.

court of equity in any case take upon itself to cancel rights created by a will executed with all the solemnities required by the statute, without first giving to the parties claiming under it an opportunity of establishing its validity before a jury.

The sentence of the ecclesiastical court not only is not conclusive, but has really no application. That court has decided that the will is ineffectual as a testamentary disposition of personalty, but it has no jurisdiction to
[*106] pronounce upon its validity as to real estate; and it is by *no means impossible that in this, as in other instances,(a) a jury, which is the only competent tribunal, may, when the evidence is thoroughly sifted on a *viva voce* cross examination, come to a conclusion directly contrary to that of a judge, who founds his opinion upon written depositions. In the meantime, this will, which is admitted to have been duly executed according to the statute, gives the plaintiffs a *prima facia* title; and while the question of right is depending, they are entitled to have the property secured to abide the result of the trial.

The *Solicitor General* and Mr. *Garratt*, for the defendants Mr. and Mrs. Dew:—Mr. and Mrs. Dew filed a bill some time ago in this court
[*107] against the plaintiffs in the present suit, to *compel them to account for the property which they had improperly possessed under the instrument now for the second time attempted to be set up; and by an order pronounced in that cause, the Clarks were directed to make a transfer of certain sums of stock standing in their names in the bank. They have refused to obey the order, and one of them has since gone abroad. The other, the party moving, is a prisoner in the fleet under an attachment for contempt. Under these circumstances, the plaintiff has no right to be heard upon the present motion. The contempt, it will be said, was not committed in this suit; but it was in a suit between the same parties, having reference to the same property, embracing precisely the same questions, and all depending on one and the same instrument. Here two parties, under different titles, assert a claim to real and personal estates, which a person professes to dispose of by

(a) "I know but one case where this variation of judgment has happened, and that was the case of *Maxwell* v. *Lord Montague;* there a testator was determined to be *compos mentis*, upon a suit in the ecclesiastical court, and that sentence was affirmed in the court of delegates: afterwards, on a trial at law in relation to the real estate devised by the will, the testator was found *non compos*, and then an application was made to the House of Lords, by petition, to reverse the sentence in the court of delegates, in order to make the determinations uniform; but the house of lords dismissed the petition, because the sentence of the delegates is decisive, and no appeal lies from it. Per Lord Hardwicke C., 3 Atk. 546. In arguing the case of *Hurst* v. *Dodgson*, which was an application made to the Lord Chancellor in December, 1829, for a commission of review, Dr. Lushington mentioned that a similar diversity of result had occurred in *Ayrey* v. *Hill* (reported in the ecclesiastical court in 2 Add. 206,) where a will, impeached on the ground of the testator's insanity, was established as a valid testamentary disposition by the judgment of Sir J. Nicholl, and was on the same ground, determined to be inoperative as a devise of real estate, by the verdict of a jury. Dr. Lushington added, that he recollected no case in which the converse had taken place,—in which a will, set aside by the spiritual court, had been held effectual on a trial at law.

a will. As to the former, the right, it is admitted, can be bound only by the finding of a jury; but as to the latter, the proper tribunal has already decided against the validity of the only instrument upon which the plaintiff's claim depends. Following up that decision, this court has made an order on the plaintiff to deliver up the property, and has sent him to the fleet on his refusing to comply. His disobedience is a gross and wilful contempt, amounting to a denial of the court's authority, and disqualifying him, so long as he persists in his obstinacy, from claiming its assistance either on the present or any other occasion.

The Lord Chancellor said, that the practice was the same, he apprehended, in equity as at law, that a party could not move, till he had cleared his contempt;[1] but that the rule must be confined to proceedings in the same cause: otherwise the consequence would be, that a party, who was utterly unable to comply with an order *of the court, might be [*108] prevented from afterwards prosecuting any claims, however just, against the person who had succeeded in obtaining that order. Here the suit was between the same parties, but it had reference to distinct properties.

For the defendants.—The plaintiffs have no right to rely on the answer of the defendants, the trustees. It cannot be read as an affidavit; for affidavits are not to be read on a motion for a receiver; and it cannot now, as it could not, at the hearing, be admitted as evidence against their co-defendants, Mr. and Mrs. Dew, who have an opposite interest.

This court never interferes by appointing a receiver, unless it entertains a clear opinion, that, when the cause is brought to a hearing, a decree must be made in the plaintiff's favor. But in this case the will has been already determined, by two consecutive judgments of the proper tribunals, to be inoperative by reason of the testator's incapacity; and it is in the highest degree unlikely, that an appeal to a jury upon that point will be attended with a different result. The defendants, the Dews, are now in possession of the property, and as far as the litigation has hitherto proceeded, the plaintiffs have shown no probable title to dispossess them. On that ground alone, a similar application for a receiver was refused in the case of *Cholmondeley* v. *Clinton*. Were their prospects, however, far more encouraging than they are, the laches of the plaintiffs, who have suffered many years to elapse since their uncle's death, without asserting any right to this property, would be a sufficient answer to the motion. Had they been really anxious to try the validity of the will in a court of law, they might have come forward to defend the action for rent brought against the devisees in trust. Instead of *that, they have allowed Mr. and Mrs. Dew to recover [*109] a judgment by default, and subsequently to levy a fine, upon which

[1] Vide 1 Hoff. Pract. 450. 2 Myl. & Cr. 53, n. 1. *Rogers* v. *Paterson*, 4 Paige, 450. *Fennings* v. *Humphrey*, 4 Beav. 7.

five years have run, so that their claim, if they ever had any, is now effectually barred.

The object of the motion is merely to harass the defendants, and, if possible, to drive them to a compromise. At the very moment when they come forward to make it, they retain in their hands, in defiance of the order of the court, 5000*l.* of stock to which Mrs. Dew is rightfully entitled; and yet they now seek to deprive her of the possession of a small strip of ground, which, even if they had any title to it, would afford her a poor compensation for the large sums of hers, which they have spent and can never repay, and for the property they unjustly withhold from her.

Sir C. Wetherell, in reply.

The Lord Chancellor:—This is an application to the discretion of the court, which is called upon by the motion, to appoint a receiver, and dispossess the heir at law. Now, it is clear from what appears in the answer, and from what is already known to the court, that the will, under which the plaintiff claims, is disputed: and the only question to be tried, in order to decide that point, is the sanity of the testator. That question, however, has been already fully investigated, as far as regards the personal estate;[1] and though the result is not conclusive as to the property now claimed by the plaintiff, the contest lay between the same parties, and the result of those proceedings was such as to furnish no reasonable ground for believing that the plaintiff will succeed, when he brings the will before the proper tribunal on an issue at law.[2] I would ask besides, if the property is exposed

[1] Vide *Tompkins* v. *Tompkins*, 1 Story's Rep. 552.

[2] In *Bogardus* v. *Clarke*, 4 Paige, 623, Walworth, V. C. said; "so far as the personal estate of the decedent [deceased] was concerned, the surrogate had exclusive original jurisdiction to try and determine the validity of the will; and the decision of this court, upon the appeal from his decision, is binding and conclusive in all courts and places, until it shall be reversed upon an appeal to a higher tribunal. It is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party, by applying to the proper tribunal before which such proceeding is had; and who will therefore be bound by the sentence or decree of such tribunal, although he is not in fact a party." After referring to the case of *Baker* v. *Hare*, cited ante, 106, n. a., and speaking as to the possibility of inconsistent decisions, upon the validity of the same will, by the equity, and the ecclesiastical jurisdictions, the Chancellor proceeds: "And although his Lordship [Hardwicke] laments that there should be such different determinations in concurrent jurisdictions, he says there is no way to make them uniform. I apprehend, however, it was a mistake to call them concurrent jurisdictions; and that this seeming anomaly arises from the fact, that each court has a jurisdiction which is entirely exclusive of the other in reference to the different interests claimed under the same will: the probate courts having the exclusive jurisdiction and right to decide as to the validity of a will of personal estate; but having no power or authority whatever to determine the right as to the real estate claimed under the will, or to decide any question which can have the effect to deprive the heir at law, or the devisee, of his common law right of trial by jury, so far as concerns the devise of real estate. Without taking any time to inquire more particularly into the reasons for this seeming exception to a general rule, it is sufficient to say that the law appears to be well settled, that the sentence of a surrogate, or of a higher court having power to review his decision, in relation to the competency of the testator to make a will of personal property, is not conclusive upon the parties to that litigation, in a subsequent suit as to the validity of a devise of real estate contained in the same will."

to any danger in the mean time, while it remains *in the possession [*110] of the defendants? The plaintiff is already bound to pay over a considerable sum to the defendants, under an order of this court; and so long at least as he retains that sum in his hands, he has a sufficient security for the rents and profits, should it ultimately appear that he is justly entitled. On both those grounds the motion must be refused but without costs.

SIDDEN *v.* LEDIARD.

1829; November 23.

In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary.

ON the death of Thomas Lediard, who had been declared a trustee and accounting party under the original decree, the suit was revived against Ann Lediard, his widow and personal representative: and she, by her answer and disclaimer, after denying assets of her testator, disclaimed all right, title, and interest in the trust property and effects in question in the cause. Afterwards, however, a supplemental bill was filed by the same plaintiffs against Ann Lediard and others, praying further declarations and relief with respect to the same trust; and by her answer to that bill, she insisted that she was entitled to receive and be paid what might be found due to her husband's estate, on taking the account of the said trust; and that she ought not to be bound by her former disclaimer, inasmuch as, at the time of filing the same, she was ignorant of the existence of many vouchers for payments made by her husband, as well as of other documents explanatory of the accounts given in by him by relating to the trust property, which vouchers and documents had, as she alleged, been discovered *at [*111] a subsequent period. The master, by his report among other things stated, that as Ann Lediard had disclaimed all interest, and the plaintiffs had waived any account against her as the representative of T. Lediard, he had not thought proper to allow any charge against the said T. Lediard, or to proceed upon the discharge which his executrix had carried into the office.

When the cause came on for further directions, Mr. *Whitmarsh* on behalf of Ann Lediard, applied for liberty to go in and prove her claims against the trust estate, notwithstanding the disclaimer she had filed. When that disclaimer was put in, she had no means of knowing how the account stood between her late husband and the plaintiffs; but they were well aware that a large balance was due to Mr. Lediard for expenses incurred in the execution of the trust. They had therefore availed themselves of her disclaimer, and artfully abandoned their charge in the hope of escaping from the payment of

that balance. The subsequent discovery of a box of papers had first led the defendant to a knowledge of the truth. There was no affidavit in support of the application, but Mr. Whitmarsh relied on the statement in Mrs. Lediard's answer to the supplemental bill, and on the facts found by the master's report, and he referred to a case of *Branch* v. *Spursell*(*a*) at the Rolls, where it was held that the defendant might insist upon a claim, notwithstanding he had put in a disclaimer.

THE LORD CHANCELLOR said, that, in order to get rid of the effect [*112] of a disclaimer, it was necessary to show *some specific ground. Here the statements in the answer were too loose and general for the court to act upon. Mrs. Lediard ought to have made a distinct application on the subject, supported by special affidavits, setting forth the facts in detail on which she founded her claim to such an indulgence.[1]

EX PARTE FARROW, IN RE ADAMS.

1829; December 8.

A committee of the person and estate of a lunatic appointed without a reference, where the property was small.

A PETITION was presented by the sister of a lunatic and her husband, praying that she might be appointed committee of the lunatic's person and estate. It appeared by affidavit that the lunatic's fortune consisted of a messuage of the yearly value of 25*l*., of 350*l*. stock in the three per cents., and of household furniture and other effects, and debts due to him to the amount of about 90*l*. more.

Mr. *Chandless*, who appeared in support of the petition, requested, that, to save expense, as the property was so small, the appointment might be made by the court in the first instance without a reference to the master. That had been the course followed in *Ex parte Pickard*,(*b*) and in *Ex parte Lacy*.(*c*)

THE LORD CHANCELLOR granted the application on the authority of the cases cited.[2]

(*a*) 1 Newl. Harr. 235; but in *Seton* v. *Slade*, 7 Ves. 265. Lord Eldon held, that a defendant could not get rid of a disclaimer upon the record, without a strong case upon affidavit. As to a disclaimer by an accounting party, see [*Glassington* v. *Thwaites*,] 2 Russell, 462.

(*b*) 3 Ves. & B. 127. (*c*) 1 Coll. 196.

[1] Where a defendant in a foreclosure suit, who had filed an answer and disclaimer, in ignorance of her rights to the equity of redemption, applied after a decree to account, for liberty to withdraw the disclaimer, and amend the answer, or to file a supplemental answer, stating her claims to the equity of redemption: the court refused the order, without prejudice to any application the defendant might make after satisfaction of the plaintiff's demand, under the decree. *Glenny* v. *Murdock*, 1 Flan. & Kel. 277. Vide etiam *Glassington* v. *Thwaites*, 2 Russ. 458, 62, n. 1, 463, n. 1.

[2] In cases of lunacy, in order to save expense, the court, in the case of a small property, constantly decides without a reference. So, an annuity of 100*l*. was directed to be paid to the wife and son of a supposed lunatic, without reference to the master; "they undertaking to apply them for

*ANON. [*113]

1829; December 15.

A committee should have the previous sanction of the court for not passing his accounts annually.

ON an application made by Mr. *Tinney*, that the committee of a lunatic might have liberty to pass his accounts, which, in consequence, as was alleged, of the smallness of the property, had not been passed since the year 1823.

THE LORD CHANCELLOR granted leave in this case, but said, that whenever from any cause it is found inexpedient to pass the accounts of a lunatic's estate regularly, an application ought to be made, in the first instance, for liberty to dispense with the general rule, and the court would then exercise its discretion on the subject.(*a*)

BURKETT *v.* SPRAY.

1829; November 27, 28.

Where a cestui que trust, having a life interest only, is declared entitled to his costs out of the trust property, the court will not give him a mere lien on it, to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them.

Decree varied on appeal in respect of costs only.

THIS was a suit to carry into effect the trusts of a marriage settlement; and one principal question related to the proper construction of a clause, which had been held by the court below to empower the trustees, during the life of the tenant for life, to sell the furniture *and other [*114] effects comprised in the settlement, and to invest the produce in stock upon the same trusts.

The cause now came on by way of appeal against so much of that decree as decided, that the trustees had a power of immediate sale, and that the tenant for life should not have his costs paid at once out of the fund by the trustees, but should have a lien for them on the property to be sold.

Mr. *Horne* and Mr. *Tennant*, for the appellant, the tenant for life.

Mr. *Pemberton* and Mr. *Girdlestone*, jun., for the trustees.

(*a*) See *Ex parte Pickard*, 3 V. & B. 127.

his benefit; but his lordship refused to direct that the son should receive the annuity in the event of the wife dying before her husband." *Conduit* v. *Soane*, 5 Myl. & Cr. 111. So Sudgen Ch. having dispensed with the committee's giving security, gave "permission to the newly appointed committee to commence proceedings for the recovery of the property without a reference." *In re Burroughs*, 1 Con. &. Law. 309. Et vide *in re Fitch*, post, 354. *In re Avery*, post, 356. As to cases in which a reference has been dispensed with, on the allowance of maintenance to infants, see *Payne* v. *Low*, post, 223. *Ex parte Swift*, post, 575. *Ex parte Chambers* post 577. On appointment of guardians, *Barry* v. *Barry*, 1 Moll. 213.

THE LORD CHANCELLOR, having expressed a clear opinion that the decree was right upon the first point, it was then argued on the question of costs.

On the one hand, it was contended, that the decree was erroneous, inasmuch as it decided that the appellant was entitled to his costs, but did not, as it should have done, provide for their payment by directing a portion of the property to be sold for that purpose. It declared his right to be reimbursed, and gave him a lien for the costs on the trust effects, as against the remainder men, till the trustees should make a sale; but it left him to recover them afterwards as he best could, possibly by an action at law. Such a direction was quite unprecedented, and was contrary to the principles of a court of equity, which always endeavored to administer complete and final justice between the parties. Admitting that the rest of the decree must stand, this was not a mere appeal on the propriety of giving costs, for it related to the peculiar and inequitable mode in which they were directed to be charged [*115] and paid, so that it formed a substantive *and not a consequental part of the decree against which relief was prayed, and it was therefore properly brought under review.

On the other side it was answered, that, assuming the decree to be right in other respects, this was substantially an appeal for costs, which, it was conceded, could never be entertained. Whether these costs were properly allowed or not, and whether they were duly provided for or not, it was impossible to pronounce without opening up the whole of the decree, which embraced a great variety of points, and against which there was no general petition of rehearing.

THE LORD CHANCELLOR said, that an appeal would lie in respect of costs, if any principle were involved, and they were not merely given as consequential on the decree.(*a*) The objection taken to the manner in which they were charged, appeared to him to be sound. The trustees and the appellant, the tenant for life, were entitled to have their costs paid immediately out of the *corpus* of the estate, without waiting to have them raised at a future period. The decree, therefore, ought to be varied to the extent of directing that the deficiency should be made good by an immediate sale.[1]

(*a*) So *Jenour* v. *Jenour*, 10 Ves. 572. *Taylour* v. *Popham*, 15 Ves. 78. Most of the cases on the subject of appeals relative to costs are brought together in a note to Mr. Blunt's edition of Ambler's Reports, 521. To these may be added, *Eyre* v. *Parnell*, 29th February, 1727; *Crosby* v. *Shadworth*, 4th April, 1728, D. P. Harc. MSS.; *Gould* v. *Granger*, Mos. 395; *Huband* v. *Huband*, 7 Bro. P. C. 433. Toml. edit.; *Tod* v. *Tod*, 1 Bligh, 638. N. S.; and see 1 Dow, 261.

[1] The circumstance, that the decree directed the costs to be paid out of a fund, is a material ingredient in deciding whether an appeal will lie from a decree for costs. The subject was considered by the late Lord Chancellor Cottenham, who, after a review of authorities, came to the following result:—"These cases seem to me to establish several propositions, any one of which is sufficient to support my jurisdiction on the present appeal: the costs are part of the relief specifically prayed; they are not mere personal costs, but are given out of the fund; and the whole of the facts, moreover, distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits." *Angell* v. *Da-*

*HODGES *v.* HORSFALL and others. [*116]

1829; December 8, 9, 16.

Where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. But unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused

In the year 1821, Samuel Hodges entered into a negotiation with William Horsfall, for the purpose of procuring a reversionary lease of a parcel of land with the buildings erected thereupon, of which Horsfall was the owner in fee. The premises were at that time subject to a lease, which was not to expire till Midsummer, 1824. After some treaty, the parties respectively signed a written agreement, which was prepared by Horsfall's attorney, and which, as far as is material to the present question, was in the following words:—"Memorandum of agreement made the 18th day of August, 1821, between William Horsfall of, &c. of the one part, and Samuel Hodges of, &c. of the other part. William Horsfall does hereby agree for himself, his heirs, executors, administrators, and assigns, to grant a lease unto Samuel Hodges, his executors, administrators, or assigns, of all those premises at Battle Bridge, now in the occupation of ——— Younge, known by the sign of the Maidenhead public house, with the additions intended to be made thereto by Samuel Hodges as per plan agreed upon, for a term of thirty-one years from Midsummer, 1824. The said Samuel Hodges agrees to pay to William Horsfall a premium of 1500*l.* sterling money for the grant of such lease, at 80*l.* per annum, the said rent to commence from the 25th day of June, which will be in the year of our Lord, 1824; the rent to be paid quarterly on the usual days for payment of rent, the first payment to be made on the 29th day of September, 1824." The agreement also contained provisos for the insertion of the usual covenants in the lease, and a *clause requiring that the [*117] additions should be made within twelve months after the lessee was let into possession; and it further stipulated, that the whole premium of 1500*l.* should be paid by Michaelmas, 1821.

Prior to this contract with Hodges, two other proposals had been made to Horsfall for a lease of the same premises, on behalf of persons of the names of Testar and Younge. The negociations, which ensued upon the subject between them and Horsfall, were afterwards successively broken off; but in the course of them, certain plans were prodnced and shown by the latter, particularly specifying the additions and improvements, which he, as landlord, would expect an incoming tenant to execute. By all of these

vis, 4 Myl. & Cr. 360. In a previous case, Lord Cottenham observed: "I have no disposition to encourage appeals for costs only. This, however, is not simply a question whether any party shall pay or receive costs; but the case involves so much of principle, particularly as to ordering the fund in the first cause to be applied towards payment of the costs of the second suit, by a decree in the second cause only, that I think this case is within the exception to the rule." *Taylor* v. *Southgate*, 4 Myl. & Cr. 203, 214. *Eyre* v. *Marsden*, id. 231.

plans, special provision was made for bringing forward the front of the Maidenhead public house, so as to be in a line with three other houses which Horsfall had recently erected on the immediately adjoining plot of ground; but two of them differed considerably in their details. According to the first, denominated Testar's plan, from having been the one shown to Mr. Testar, it was intended that the whole of the old buildings, together with the required additions, should compose a single tenement only. According to the other two, of which one was rather more ornamental than the other, but which were substantially the same, and were treated throughout the argument as forming one plan, and distinguished by the name of Younge's plan, it was proposed that the additions should be made in such a manner as to constitute, with the original building, two houses.

In the month of August, 1821, immediately on signing the agreement before stated, Hodges paid into the hands of Horsfall the sum of 100*l.* as part of the stipulated premium; and, in the October, following, Horsfall [*118] having *caused a lease to be prepared, to which was annexed a copy of the plan called Testar's plan, tendered it for execution to Hodges, and at the same time made a demand upon him to pay up the balance of the consideration money. Hodges, however, refused to execute the lease; and Horsfall thereupon commenced a suit for specific performance, alleging, that the plan for converting the old buildings, together with the proposed additions into one tenement, was the one specifically designated by the memorandum. In his defence, Hodges insisted, that if any plan were particularly referred to, it was not Testar's but Younge's plan, according to which the premises, with the projected alterations, were to form two houses, and he offered to accept a lease on the footing of that plan. That cause came on to be heard on the 27th of January, 1824, when Horsfalls, having failed in his proof, the Vice-Chancellor decided, that there was no such agreement such as the court could perform; and the suit was dismissed with costs.

The present bill was then filed by Hodges against the daughters and coheiresses at law of Horsfall, who had died in the meantime, and against certain other persons who had accepted a lease of the premises in question with notice of the plaintiff's claim. It set forth at large the facts already detailed, and the proceedings in the previous suit. It charged that the only plans shown to the plaintiff during the treaty, were the two which had been received from Younge, and that of those the least expensive and ornamental was the one particularly referred to and intended, though certain other trifling alterations which it specified, with respect to rounding off the west corner of the building, had also been verbally agreed upon; and it prayed a specific performance of the contract on the basis of that [*119] *plan; or if the court should not be satisfied that Younge's was the plan agreed upon, it prayed in the alternative that the parties might be decreed to execute a proper lease and counterpart on the foot-

ing of Testar's plan. On the 6th of June, 1826, the cause came on to be heard before Lord Gifford, then Master of the Rolls, who dismissed the bill with costs.

The plaintiff Hodges now appealed from that decree. The material parts of the evidence adduced in support of the appellant's case are stated in the judgment of the Lord Chancellor.

Mr. *Horne*, Mr. *Pepys*, Mr. *Beames*, and Mr. *Wigram*, for the appellant:—There is no dispute here as to the extent of the premises proposed to be demised: neither can the defendants be now heard to say, that this was not a final and binding agreement; since they or the party whom they represent, recognized it as such by filing a bill claiming to have it specifically executed. The payment made by the plaintiff likewise, though, according to the modern doctrine, it cannot be considered as a part performance, sufficiently shows what was his impression. The only remaining question is, what were the alterations which the agreement meant to require, and what was the plan there referred to; for if, as we allege, those alterations were particularly described in a plan or drawing upon paper, and if that plan can be identified with the plan mentioned in the memorandum, it becomes, in effect, incorporated with it, and every term of the contract, as the statute requires, is ascertained by an instrument in writing. That some drawing or delineation upon paper was particularly pointed at by the words, "as per plan agreed upon," will *hardly be denied: both parties concur in that, and the [*120] phrase itself sufficiently shows it. But the doubt arises from the circumstance, that in the course of the different negociations several plans were produced, and in order to clear up that doubt, we are compelled to resort to extrinsic evidence. Had the language of the reference been, "as per plan marked A," the difficulty would have vanished entirely. As it is, a larger body of evidence is necessary, because the words are general, and only go to establish the fact of a specific plan being in existence without giving us any assistance in distinguishing the one particularly meant, from others with which it might be confounded. But in all these cases the principle is the same, viz. that, wherever the principal agreement refers to another paper, as a substantive part of the contract, parol evidence becomes immediately admissible for the purpose of showing what that particular paper is, and of thus connecting the two instruments. That doctrine was laid down by Lord Redesdale in *Clinan* v. *Cooke*,(*a*) and was recognized by Lord Eldon in *Saunderson* v. *Jackson*.(*b*) The same rule has always been acted upon in the cases of agreements established on the language of a written correspondence, where parol evidence is called in to identify and connect the different letters, and if the letters so connected sufficiently ascertain the material terms of the contract, the statute is held to be complied with. *Western* v. *Russell*,(*c*) *Richards* v. *Porter*,(*d*) *Tawney* v. *Crowther*,(*e*) a case which, as to this point, has

(*a*) 1 Sch. & Lef. 32. (*b*) 2 Bos. & Pull. 238. (*c*) 3 V. & B. 187. (*d*) 6 B. & C. 437.
(*e*) 3 B. C. C. 318; and see also *Ogilvie* v. *Foljambe*, 3 Mer. 53.

never been doubted, though Lord Redesdale has censured it on other grounds. In every case of this kind, indeed, the single difficulty is to [*121] *find out what are the particular papers referred to; and the difficulty, of course, increases in proportion as they are numerous; but that applies only to the proof, and does not vary the law. If it were otherwise, the defendant would merely have to manufacture half a dozen different papers, and then alleging the want of precision, which his own fraud had created, as a reason for resisting the introduction of parol testimony, might bid defiance to any suit calling on him specifically to perform his contract. In short, all that is required, in order to let in the evidence, is, that the agreement should contain an express reference. In *Clinan* v. *Cooke*, and in *Boydell* v. *Drummond*,(*a*) (the only case cited on the other side on the argument in the court below,) there was no such reference. In the prior suit of Horsfall against Hodges, it appears from the decree that the depositions on the part of Horsfall were allowed to be read, to prove that Testar's plan was the one referred to, and, in the present cause, the plaintiff's depositions were admitted at the Rolls to prove that it was Younge's. There can be no question, therefore, that, on the grounds both of principle and practice, the evidence now offered by the plaintiff for the purpose of identifying Younge's as the plan referred to by the agreement, must be received; and if it be received, it is conclusive in his favor. Lord Gifford was induced to dismiss the bill, not upon the merits, but from an idea which was strongly pressed on his mind by the defendant's counsel, that the dismissal in the former cause decided the point in the present. But that idea was plainly erroneous: the appellant had nothing to do as a defendant in the former suit, but to resist, as he did successfully, the claim set up by Horsfall for a lease on the basis of [*122] Testar's plan; *and the decree dismissing the bill of Horsfall, could never prejudice the appellant's right to relief upon an entirely different case, which he might, afterwards as plaintiff, be able to establish on a bill of his own.(*b*)

The *Solicitor General*, Mr. *Roupell*, and Mr. *Koe*, contra:—Where an agreement particularly describes and points to a written document, or a paper plan, previously existing, the link, which is necessary to connect them together, may undoubtedly be supplied by parol evidence. But no such case is now before the court. The words of reference here are not specific or descriptive. They import no more than that some plan, constituting an important term in the contract, had been finally arranged before the memorandum was signed; but they do not state, nor do they of necessity imply that it was a drawn or paper plan. For any thing that appears, the alterations agreed upon might then and long afterwards be resting merely in the breast of the parties; and if so, the evidence would be clearly inadmissible. *Weeks* v.

(*a*) 11 East, 142.

(*b*) See *Higginson* v. *Clowes*, 15 Ves. 516, and *Clowes* v. *Higginson*, 1 V. & B. 524.

Maillardet.(*a*) Even if there was a drawing in existence, (as to which the agreement leaves us wholly in the dark,) no clue or mark is given by which to trace and ascertain it: and considering the variety of plans which were talked of and produced in the progress of the treaty, the reference is altogether of too loose and general a character, to warrant us in resorting to the aid of testimony to supply the material defect in the written instrument. *Brodie* v. *St. Paul.*(*b*) The authorities *adverted to, in which [*123] parol testimony has been called in to connect and identify a series of letters, so as to make up from them a complete contract in writing, have no application. They are all cases where effect has been given to previously existing documents, by agreements distinctly referring to and embodying them; whereas, here there is nothing to indicate with certainty, that the particular plan intended was then delineated on paper; or to distinguish it, if it were, from twenty others, more or less dissimilar, and either expressed or understood, for which it might be easily mistaken.

But we are not left to conjecture, that the plan referred to as the one finally determined on, was not a drawing upon paper. That appears plainly from the plaintiff's own bill, where it is stated that Younge's was the plan intended, but that, "from the conversations that passed upon the subject at the time of signing the agreement, it was considered by all parties present that the plan was not material." Besides, though Younge's plan was to be the basis, it certainly did not specify the whole of the required additions, and, therefore, could not possibly be "the plan agreed upon:" for the bill goes on to state, that it was to be subject to some trifling alterations for the purpose of rounding off the west corner of the building. Passing by the insuperable objections opposed to this suit by the statute of frauds, and by the impossibility of now ascertaining the precise nature of these alterations, the very fact that they had been verbally arranged and rested in understanding only, proves, beyond a doubt, that the plan spoken of as the one agreed upon could be neither of the two, upon which the plaintiff founds his claim to specific performance, but something different from both. Whether the difference was greater or less, is quite *immaterial. It is enough to have [*124] shown, that one term of the contract was not, at the time when the memorandum was signed, reduced to certainty upon paper.[1]

If the evidence were admitted, however, the plaintiff would not better his situation: for the case which the evidence establishes is at variance with that made by his bill, and totally destructive of his equity. The bill alleges, that a lease was agreed to be granted to the plaintiff on the basis of Younge's plan, with the exception already adverted to. But what do the depositions of Willis and Warlters prove? Why, that no specific plan was referred to in

(*a*) 14 East, 568.

(*b*) 1 Ves. jun. 326, and Mr. Vesey's remarks on that case, 11 Ves. 553, note, 2 Sch. & Lef. 7.

[1] Vide *Squire* v. *Campbell*, 1 Myl. & Cr. 480.

particular; that it was a matter of comparative indifference to the parties, and probably of subsequent arrangement, what plan was to be adopted; and that if any plan had been finally settled, it was only understood between themselves, and had never been delineated on paper. If there had been a plan definitely fixed and reduced to writing, there can be no doubt that, on the solicitor asking for it, at the time when the contract was signed, it would have been forthcoming, or at least have been described in such a manner as to prevent the possibility of mistake.

But, supposing that the evidence were admissible, and supposing that by its assistance the terms of this imperfect memorandum were completely and clearly explained, and that they were moreover sufficiently expressed in writing to satisfy the statute, it would still remain extremely doubtful whether the agreement is of such a kind as the court, in its discretion, will think proper to be enforced: for it is really in the nature of a building contract, as to which courts of equity, aware of the practical difficulties in which [*125] they are involved by *interposing, generally prefer leaving the parties to their legal remedies. *Flint* v. *Brandon*.(a)

Mr. *Horne*, in reply, contended, that, as the defendants had read no evidence, although they had given notice of their intention to use the depositions taken on their behalf in the previous cause of *Horsfall* v. *Hodges*, there was nothing now to show the existence of any other plan than Younge's. That was the one, therefore, to which of necessity the reference must apply, and according to which, as the evidence distinctly connected it with the memorandum, the decree for specific performance must be made. The objection, founded on the nature of the agreement, was groundless; for the court had frequently enforced the execution of a building contract, and could easily do so in a case like the present, where the extent of the proposed additions, and the dimensions of the several parts, were all minutely and accurately laid down in a drawing upon paper.

December 16:—The Lord Chancellor:—Two points were made by the defendants in the argument. First it was insisted that parol evidence was not admissable to prove what was the particular plan agreed upon; and, secondly, even if it could be admitted, still that, in this case, there was no sufficient evidence to show that Younge's was the plan intended, or that, in fact, there was ever any precise or definite plan agreed upon at all. As to the first point, I am of opinion on the authority of all the cases, and especially the case in 1 Schoales and Lefroy, where Lord Redesdale has considered the subject very fully, that, as the written agreement refers specifically to a plan, if [*126] there be parol *evidence, clear and satisfactory, to indentify the par-

(a) 8 Ves. 159. The authorities are collected in 3 Swanst. 437.

ticular plan, that evidence may be properly admitted for the purpose of so identifying it.[1]

Then the next question arises, whether there is sufficient evidence here to show what particular plan was agreed upon. This depends entirely on the testimony of two witnesses, Willis and Warlters. Willis in his deposition says, that, towards the end of July, 1821, Hodges called on him with two plans, (which have been in the argument called Younge's plans, and were substantially the same,) containing the proposed alterations in the premises, which he showed to Willis; that Hodges stated, that a meeting with Horsfall on the subject of the plans was to take place in the early part of August, at which he requested Willis to attend, and he left with him the two plans. Willis accordingly attended at the meeting between Horsfall and the plaintiff, sometime early in the month of August. On that occasion Willis produced the two plans, which had been left with him by the plaintiff at the previous interview, observing to Horsfall, when he delivered them, that these, he understood, were the plans that were to guide Hodges in the intended additions to be made to the premises, and that the front of the messuage was to be brought forward so as to be in a line with the adjoining houses—an observation to which Horsfall assented. Willis also states, that, as the friend of Hodges, he suggested some other alterations, whereupon Horsfall remarked, that these or any other trifling alterations, which might be suggested by the friends of the plaintiff, should have his concurrence: "but as regarding the material alterations, that (laying his hand on one of the two plans), is the one I wish the plaintiff to abide by." Nothing further took place at this interview; no answer was made to that remark of Horsfall, either *by [*127] Willis or by the plaintiff; and, looking to the evidence, it is impossible to say it has been satisfactorily established, that either of the two plans was finally agreed upon, as the precise and definite plan to be followed in executing the projected alterations. No meeting or conversation appears from the evidence to have taken place, subsequently to that interview, until the 18th of August, when the parties again met for the purpose of signing the agreement. Besides the two I have mentioned, another plan which has been called Testar's plan, and which is particularly adverted to in the prayer of the bill, appears to have been in existence, and known to the parties. According to the evidence of Warlters, Lythgoe, who was present at the signing of the agreement, and who acted as Horsfall's attorney in the transaction, read over the agreement, and asked the parties whether they had any plan of the intended improvements and alterations, on which Horsfall said, "it is no matter, we understand each other;" and the plaintiff thereupon added, "you only

[1] "I have lately had occasion to examine this subject, and came to the conclusion, that when a contract referred to the subject matter, but by a vague insufficient description, the defect might be supplied by other documents, coming from, or adopted by the party making the contract, and made pending and connected with the transaction." Hoffman, Assistant, V. C. 1 Hoff. Ch. Rep. 139.

wish to have the ground covered to do away with the nuisance," and Horsfall rejoined, "we shall have no difficulty about that, we understand each other," or words to that effect. But the witness Warlters says, that no plans were produced or shown at the meeting at which the agreement was signed. This evidence, so far from leading to the belief that the parties had some definite plan fixed upon, tends rather the other way, and would lead one to suppose, that the agreement upon that point was either not definitively settled, or that it was in the breast of the parties themselves. And if there be not sufficient, as I think there is not, in the evidence of Willis, to fix the precise nature of the plan agreed upon, the doubt will be strengthened, rather than removed, by the evidence of Warlters, as to the subsequent transaction.

[*128] *On the whole, there is not enough in this case to satisfy my mind, that the parties had agreed upon either of those plans; the decision of the Master of the Rolls must therefore be affirmed, and with costs.

Scott v. Hanson.

1829; December 9, 11, 12.

If land, generally reputed to be water meadow, is sold by the assignees of a bankrupt by the description of uncommonly rich water meadow, whereas in fact it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale.

The bill was filed in the year 1813, to compel the specific performance of a contract entered into in the year 1810, by which the defendant had agreed to purchase from the assignees of a bankrupt a piece of copyhold land, forming part of the bankrupt's estate, and described, in the particular of sale, as a lot consisting of fourteen acres of uncommonly rich water meadow. The master by his report, dated in March, 1824, found that the plaintiffs had not established a clear title to the premises as *water meadow*, but that in all other respects a good title had been shown. To this report cross exceptions were taken; and on the argument of those exceptions (reported in 1 Sim. 13,) Sir J. Leach, then Vice-Chancellor, ruled, that the plaintiffs were not bound to make out a title to the lands as perfect water meadow, and that there was no valid objection to the specific performance upon that ground; but being of opinion that a good title in other respects had not been made out, he gave the vendors liberty to go again before the master, and tender farther evidence on the subject.

The defendant appealed from that order.

Mr. *Knight* and Mr. *Girdlestone*, for the purchaser, stated that

[*129] there were two questions to be determined: *first, whether the plaintiffs were bound to show that the description they had given of the lands was correct; and, secondly, whether, so long after the period of the contract, they had a right to further time for the purpose of making out their title. On the first point it was contended, that, to describe lands as uncom-

monly rich water meadow, was equivalent to calling them water meadow of the best quality, or uncommonly well watered meadow: that so far from that description being applicable here, it was admitted, that two acres were wholly incapable of being irrigated; and the remaining twelve were, at best, very imperfectly watered, and did not deserve the appellation of water meadow, much less of uncommonly rich water meadow. The evidence proved that the owner of the lands had no control over the hatches through which the water was admitted, and that the supply of water was extremely scanty, and was at certain seasons barely sufficient to feed a mill stream higher up, which had a preferable right to the use of it. The description, therefore, being grossly incorrect, was such a misrepresentation as justified the purchaser in refusing to complete his contract. *Norfolk* v. *Worthy*,(a) *Stewart* v. *Alliston*.(b) If there was any dispute, as it appeared from the evidence there certainly was, respecting the legal right of the owner of the lands to the unlimited enjoyment of the water, a court of equity would not compel the defendant to accept a title which he could establish only by an action at law. *Stapylton* v. *Scott*,(c) *Jervoise* v. *Duke of Northumberland*.(d)

On the second point it was insisted, that the vendors had suffered fourteen years to elapse between the date of the contract and the [*130] master's report, without taking proper steps to complete their title: and it was very hard on the defendant, that, notwithstanding the lapse of time, and the great depreciation of land in the meanwhile, he should be still held strictly to his bargain, and be compelled to wait in suspense, in order to give the plaintiffs a further opportunity of patching a title, which all their industry might never be able to perfect. The bill ought to have been peremptorily dismissed.

The *Solicitor General* and Mr. *Jacob*, contra, contended, that the defendant had himself to blame for any delay which had occured, as he had thrown every possible difficulty in the way of the plaintiffs. The descriptive words obviously applied, not to the extent of the irrigation, but to the quality of the land; but, if it had been otherwise, still they were merely the vague flourishes of the auctioneer, and could not relieve the purchaser from the necessity of inspecting the property for himself, and forming his own judgment: still less could they bind the vendors, who were assignees, and had nothing to do with the sale personally. Such indefinite phrases were only relative, and ought to have put the purchaser on inquiry. *Fenton* v. *Browne*.(e) What was to be denominated a roomy house, an eligible investment, or an uncommonly rich water meadow, was a mere matter of opinion, depending partly on the local situation of the property, and partly on the rank and character of the person forming the estimate. It was clear, upon the affidavits, that the lands were water meadow, and that they were always so called and considered in the

(a) 1 Campb. 337. (b) 1 Mer. 26. (c) 16 Ves. 372.
(d) 1 J. & W. 559. (e) 14 Ves. 144.

neighborhood. As to the other point, the reference back to the master was unnecessary; for the identity of the parcels, as to which the Vice-
[*131] Chancellor had doubted, *was sufficiently established by the evidence of the steward of the manor, and the entries in the court rolls. The decree, therefore, should be made at once for a specific performance.

THE LORD CHANCELLOR expressed his concurrence in the opinion, that the epithet "uncommonly rich," was applicable to the quality of the land, and not of the irrigation. It was admitted on all hands, that two, out of the fourteen acres, were not meadow land, or capable of being watered; but there was no evidence to show any fraud or intentional misrepresentation on the part of the vendors. The lands were sold, not by the bankrupt, but by his assignees; and it did not appear they were apprised of the nature of the property. As to those two acres, therefore, the defect of quality would form a proper subject of conpensation. With regard to the remaining twelve, he was of opinion, after a careful review of all the affidavits (which his Lordship went through minutely,) that, although this certainly did not seem to be the best water meadow in the district, and might even possibly, as one witness had sworn, be the worst, no reasonable doubt could be entertained as to its bearing the character of water meadow. To entitle it to that character, it was not necessary that there should be at all times the uncontrolled use and command of the water. As to the evidence of identity, the apparent discrepancy between the extent of the mill mead, as described in the court rolls, and the property now included in the contract, would perhaps be explained by supposing, that a portion of the mill mead was freehold; which might be a proper ground for sending it back to the master for further inquiries. Under these circumstances, the judgment of the Vice Chancellor on both points ought to be affirmed.[1]

[*132] *FAWCET *v.* WHITEHOUSE.

1829; December 15, 17, 21.

A person employed on behalf of himself and his co-partners in negociating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such stipulation, the party receiving it was declared to hold it in trust for the partnership.

Before the transaction was discovered, one of the partners withdrew; and subsequently, another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern: held; that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared.

MESSRS. Knight & Co. were lessees for a long term under Hill and Hopkins, of certain lands and mineral property, with the iron works and

[1] Vide *Followes* v. *Lord Gwydyr*, ante, 83. S. C. 1 Sim. 63.

furnaces thereunto belonging, situate at Verteg, in the county of Monmouth, where they carried on extensive business as iron masters for a number of years. Latterly, however, they had found the works to be unprofitable, and had in consequence discontinued their operations; and as the premises were subject to a heavy rent, they became anxious to relieve themselves from farther liability by dissolving the company, and giving up or assigning their lease. With that view they set on foot a variety of negociations with different persons, chiefly through the agency of Benjamin Whitehouse, whom they employed to look out for some enterprising capitalist, who might take the property off their hands; and finally, in November, 1818, they concluded an agreement, (which was afterwards, on the 2d of February, 1819, carried into effect by a formal deed,) whereby, in consideration of the same yearly rents and covenants as were contained in their lease from Hill and Hopkins, they agreed to demise the lands, mines, and other premises comprised in that lease, together with certain contiguous freeholds of their own, unto William Fawcett Charles Shand, and the said B. Whitehouse, for a term of twenty-four years. Contemporaneously with this transaction a co-partnership was formed between Fawcett, *Shand, and [*133] Whitehouse, for the purpose of working the mines, of which they obtained possession by virtue of their under lease from Knight & Co.; and they accordingly continued in partnership as iron masters, each holding an equal third share in the leasehold property and the stock, till the month of November, 1820, when Shand withdrew from the concern, and assigned all his interest in the premises, together with his share in the business, to the two remaining partners, Fawcett & Whitehouse, who carried on the trade as before. In the course of the following year several other persons were introduced into the firm, and, on the 23d of October 1821, when, besides Fawcett, & Whitehouse, it consisted of James Hunt, Henry Hunt, Kenrick, & Priestley, a new deed of co partnership was executed, specifying the amount of capital advanced by the different partners, and declaring the shares, which, under the arrangement then made, they were each to be considered as holding in the stock and profits of the company. Shortly afterwards Whitehouse also became desirous to retire, and by an instrument bearing date the 2d of February, 1822, he released and assigned all his rights and interests under the lease and co-partnership deed to the remaining partners, in consideration of a sum of 13,500*l.*

The bill, which was filed by Shand, as an original partner, and by Fawcett J. Hunt, H. Hunt, Priestley, and Kenrick, as the continuing partners, against B. Whitehouse, set forth these transactions in detail. It then went on to state, that, sometime after the retirement of Whitehouse from the firm, the plaintiffs had discovered, as the fact was, that, immediately on the execution of the deed of the 2d of February, 1819, the defendant had received from Knight and Co. the sum of *12,000*l.* It alleged that payment [*134] to have been made in pursuance of a previous agreement, whereby

Knight & Co. had undertaken to accommodate Whitehouse with 12,000*l.* (at first in the form of a conditional loan, which was afterwards converted into an absolute gift,) for the purpose, as was pretended, of enabling him to advance the capital required for the partnership into which he was then entering, but in reality by way of premium for his services in procuring responsible tenants for the premises, and thereby relieving the former lessees from their liabilities to Hill and Hopkins. It alleged that this agreement was studiously concealed by Whitehouse from the knowledge of his co-partners, and that it was made at the very time he was engaged, on their behalf and his own, in negotiating the treaty for the under lease, when it was his especial duty to obtain, as he frequently professed he had done, the most favorable terms for the new company. It charged that the plaintiffs Fawcett and Shand, in acceding to the terms of the under lease, and in embarking with Whitehouse in the joint adventure, had been mainly influenced by his representations, and had relied with implicit confidence on his integrity and honor; that, inasmuch as he had been confidentially employed for their common interest, he was not entitled to derive any private pecuniary benefit from the transaction, without communicating an equal share of it to them; that, by accepting the alleged bonus from Knight & Co., he had intercepted an advantage that must otherwise have accrued to the partnership, which had of course sustained a loss in the terms of the contract to an equal amount; that under these circumstances his receipt of the 12,000*l.* was, in equity, a fraud upon his partners; and that, as to two-thirds of that sum, he ought to be considered a trustee, who had received the money for their use.

[*135] *The bill farther alleged, that, doubts having arisen with respect to the rights acquired in this claim by the new partners under the deed of October, 1821, the plaintiff, Fawcett, by a subsequent instrument, declared the true intent of that deed to be, that the claim should vest in the continuing partners respectively in the same shares and proportions as the rest of the copartnership stock. The bill prayed a declaration that the defendant had received the 12,000*l.* on behalf of himself and the plaintiffs Shand and Fawcett equally, and that he was a trustee, as to one-third part of that sum, for Shand, and as to another third part for the other plaintiffs, or for the plaintiff Fawcett alone; and that the plaintiffs might be declared respectively entitled to receive the same from him accordingly.

The cause was heard on the 17th of December, 1825, before Sir J. Leach then Vice-Chancellor, when his Honor made a decree according to the prayer of the bill, and charged the defendant with interest at 4 per cent. on two-thirds of the amount he had received, and directed him to pay the costs.(*a*)

The defendant appealed against that decree; the suit, having become

(*a*) See note (A) at the end of this case.

abated by his death, was subsequently revived; and the rehearing was now prosecuted by his personal representatives.

The particular details of the case, and the substance of the evidence adduced in support of it, are given fully in the judgment of the Lord Chancellor.

The *Solicitor General* and Mr. *Rolfe*, for the plaintiffs, observed, that the principle, on which the equity *of the case depended, was [*136] extremely clear, and had long been the settled law of the court, viz. that, wherever a person is concerned in a transaction in the confidential relation of one agent for another, he shall not be allowed to take advantage of his situation in order to obtain a personal benefit to himself; and that wherever he does obtain such a benefit, he shall account for it strictly to his employer. The case of *Carter* v. *Horne*(*a*) was one of the earliest, and the recent decision with respect to the *Arigna Mining Company*(*b*) one of the latest instances, in which the rule had been recognized. The cases, likewise, in which factors had been compelled in equity to refund their gains, when, by clandestinely acting in the double character of merchant and factor, they intercepted a portion of the profits due to their principals, were another illustration of the same rule; and many others might be mentioned less similar perhaps in their specific circumstances to the one before the court, but bearing a close analogy in point of principle.(*c*) It was impossible to distinguish the present case from that of a man, who, when engaged in the capacity of agent for the purchase of an estate, contrives, by a private understanding with the vendor, to charge a higher price for it to his employer than the sum actually paid, and to put the difference in his own pocket. Could there be a doubt, that, if his conduct were discovered, he would be compelled, on a bill filed by his principal, to refund the money thus fraudulently obtained? If the real transaction were concealed from the purchaser, no allegation or even proof that the vendor intended the additional payment as a personal *bounty to the agent would avail as a defence against such a bill. [*137] So neither would it avail here.

The general principles of the court with respect to the duty of trustees had always been rigorously applied to partnership transactions. Thus, if two or more individuals entered into a joint speculation, no one of them had a right to draw a secret advantage from the contract behind the back of his companions. *Carter* v. *Horne*. The same rule had been enacted upon in those cases, where one partner, having obtained a renewal of a partnership lease in his own name, is held to be in equity a trustee for the rest.(*d*) It was clear, that a partner was under the obligation of doing every thing that was done

(*a*) 1 Eq. Ab, 7. (*b*) *Hichens* v. *Congreve*, in the note (B) at the end of this case.

(*c*) See, in particular, *East India Company* v. *Henchman*, 1 Ves. jun. 287. S. C. 8 B. P. C. 85, Toml. edit. *East India Company* v. *Keighley*, 4 Madd. 16. *Burton* v. *Wookey*, 6 Madd. 367.

(*d*) *Featherstonehaugh* v *Fenwick*, 17 Ves. 298.

relating to the partnership, in such a manner as would best promote the common interests of the concern: and would it be pretended that it was more competent for him to gain a clandestine benefit of this kind, than to sell a portion of the joint property for his separate advantage?

The doctrine was founded on considerations of general policy, and was equally applicable, therefore, whether the gain of the trustee was or was not shown to have been attended with loss to the cestui que trust: of course, where it was obtained at the expense of the latter, the rule applied with peculiar force. That was undoubtedly the case here. Knight & Co. were in circumstances of great responsibility and embarrassment; in their anxiety to escape from their difficulties, they had in vain offered a sum of 26,000*l.* to their landlords to induce them to accept a surrender of the lease. Afterwards they were glad to throw in their own valuable freeholds as a [*138] free gift, to be added to the premises comprised in the *proposed under lease; and after all, the transaction still seemed so beneficial, that, to enable them to bring it to a definite settlement, they thought it worth their while to purchase the secret services of the defendant by a bribe of 12,000*l.* It was clear, that if the real situation of Knight & Co. had been communicated to Fawcett and Shand, as it was incumbent on Whitehouse to have done, they would either have broken off the treaty, or have concluded it on terms much more favorable for themselves. At all events, the partners might fairly have demanded, and would doubtless have received, the 12,000*l.* as a bonus for the acceptance of the lease. The bill only asked relief to that extent. It was the duty of Whitehouse, dealing as he did on behalf of himself and of co-partners who relied implicitly upon him, to secure for them the best terms that could be had: and if, by any underhand agreement, he placed himself in a position where his private interest was at variance with his public duty, (conduct which a court of equity(*a*) uniformly discountenanced,) and he had not firmness to withstand the temptation, the consequences of his fraud must fall upon his own head, and not be charged upon his innocent partners.

Mr. *Horne* and Mr. *Roupell*, for the defendant admitted that the doctrines propounded on the other side, and the authorities relied on in support of them, were not to be controverted; but they insisted, that they were totally inapplicable to the present case. The nature of the transaction had been greatly misrepresented. What had been called by the harsh name of bribe, was, in truth, nothing more than a loan promised by Knight & Co. [*139] *without interest, in consideration of the exertions of Mr. Whitehouse, in finding for them a substantial tenant, capable of paying the rent and keeping the premises in repair; and it had no reference whatever to these particular plaintiffs. There was no principle, either in morals or in

(*a*) *Burton* v. *Wookey*, 6 Madd. 367, and the Vice-Chancellor's observations in *Glassington* v. *Thwaites*, 1 S. & S. 131–133.

equity, which forbade them to offer, or him to accept, such an accommodation. The subsequent conversion of the loan into a gift, at first conditional, though subsequently made absolute, could not alter the character of the transaction. It was the voluntary expression on their part of gratitude for his successful exertions; and it was intended to supply him with the means of joining a partnership, in which, without the aid of his skill and experience, Shand and Fawcett could not have embarked. If the money had been afterwards presented as an acknowledgment for the benefits derived from his mediation, his partners could have had no reason to complain, and surely the circumstance of its having been a matter of previous arrangement could not make any difference. It was a sum paid in the nature of commission for personal services rendered to Knight & Co., by which Shand and Fawcett, who were thereby induced to engage in a lucrative speculation, so far from being losers, were actually benefitted. The formation of a responsible partnership, able and willing to undertake the engagements of Knight & Co., to Hill and Hopkins, was the work of Mr. Whitehouse alone; and to him, therefore, the reward exclusively belonged. In no possible view could it be shown to have deprived his partners of a single shilling.

It was a mistake to suppose that Mr. Whitehouse had acted in a twofold capacity at the same time. He was employed as the agent of Knight & Co. till the partnership was formed, and no longer. Strictly speaking, he was never the agent of the partnership at all. The fact was, [*140] that, entertaining a favourable opinion of the project himself, he opened a correspondence with Mr. Shand, and through him with Mr. Fawcett; and that terminated in their accepting the proposals, which Knight & Co. had authorised him to make. Messrs. Shand and Fawcett were perfectly content to close with him on the footing of the written proposals. They entered into the agreement with their eyes open; and not till after they had assured themselves, by a careful inspection of the property, that the defenant's statements were correct. Thus far the defendant acted on behalf of Knight & Co.: whatever he did subsequently, was done as a member of the new concern; and from the moment he joined it, his best efforts were devoted to its interests. In settling the particular form and conditions of the lease, which was left principally, though not entirely, to his management, (for his partners more than once insisted on alterations in which he reluctantly acquiesced,) there was nothing to show that he did not, as he had represented, obtain the best terms that could be had. On the contrary, as his partners themselves superintended and revised the lease, as they had adopted instead of repudiating it, and did not now venture to impeach it on the ground of fraud it was clear that his representations had been true. If it were a fraud, why were not Knight & Co. brought before the court, who, being participators in the benefit, were at least equally accountable? But the whole conduct of the plaintiffs showed that it was an honest transaction: the deed, constituting the partnership and conveying the property, was executed after great deliberation;

it distinctly expressed what each party was to receive, and undertook to perform: they all professed themselves fully satisfied with it: and it was [*141] not competent for any of them, at *this late period, to set up a claim inconsistent with its provisions.

The bill was defective in point of pleading: it was filed by persons, some of whom were no parties to the original transaction, and whose only title was derived from an assignment made to them by Fawcett. But a claim, such as this, founded on an alleged breach of trust to be established by a suit in equity, was not capable of assignment; for that would amount to champerty. There was no privity between Shand and the new partners, and they could not, as it was incumbent on co-plaintiffs to do, show they had a common interest in the subject of the suit. *Cholmondeley* v. *Clinton* (*a*)

The *Solicitor General* in reply.

December 21.—The Lord Chancellor:—From the importance of the question in point of amount, and also from the circumstances affecting, to a certain degree, the character of individuals concerned in the transaction, I thought it right, before I finally disposed of the case, to look minutely into the evidence, both on the one side and the other, adduced in the course of the cause.

The facts of the case were these:—Messrs. Hill & Co. were the lessees of mines and certain iron works in Wales, called the Verteg iron works. They underlet their interest to Knight & Co. for a long term, at a rent of 2600*l.* a year, and on condition that the premises should be kept in [*142] repair. About twenty-four *years of that term remained unexpired.

In consequence either of some difference among themselves or of some mismanagement, Messrs. Knight & Co. discontinued the works. The works having remained unproductive for a period of five years, they were extremely desirous to get rid of the concern; so much so that they had offered the sum of 26,000*l.* or 28,000*l.* to Messrs. Hill & Co. on condition that the latter would accept a surrender of the lease, which however they refused to do. Upon this refusal, they became desirous, if possible, either to assign the lease to some persons of respectibility, who were competent to carry on the works, or in some shape or other to dispose of the concern. They had purchased freehold property contiguous to the mines, and of importance to them on account of the limestone it contained. They were willing, according to the evidence of Mr. Hancock, on condition that any person would accept an assignment or under lease of the mine, to give up their whole interest in the freehold property; and, according to the evidence of another witness, they were willing, also, to make a considerable pecuniary sacrifice in addition to the surrender of the freehold property. They entered into a communication and correspondence with the defendant, who was well acquainted with trans-

(*a*) 2 J. & W. 135.

actions of this nature, and undertook to endeavour to procure persons of respectability and character to engage with him in this concern. On behalf of Knight & Co. the negociation was conducted by Mr. Hancock, one of the partners. In the month of October 1818, Mr. Hancock wrote a letter, which has been principally relied upon on the part of the defendant, stating the terms on which Knight & Co. were disposed to part with the works. Those terms were to be an asssignment of the lease, subject to the existing rents and covenants, and an absolute gift of the freehold property. Nothing more was *stated in the letter which was addressed to Mr. White- [*143] house, who was to have the opportunity of using it, for the purpose of inducing other persons to embark with him in the adventure. In addition, however, to the terms mentioned in that letter, probably at the same period, though that does not very distinctly appear—certainly early in the progress of the negociation—a particular advantage was stipulated for in favor of Mr. Whitehouse, upon the nature of which a great deal will depend. The stipulation was, that, if the arrangement should be ultimately completed, and if Mr. Whitehouse should succeed in procuring respectable persons to join him in the undertaking, Knight & Co. should advance to him the sum of 12,000*l.* without interest, half of which was to become his own property unconditionally at the end of seven or eight years, and the rest of it was to become his absolute property at the expiration of the term, provided that up to that period they had been indemnified by the partnership against the clauses in the lease granted by Hill & Co. In the event of any default, the repayment was to be secured by a bond. When this arrangement was made by Mr. Whitehouse, he, in the first instance, communicated the proposed terms to Messrs. Jeavons, who refused, however, to accept them. Afterwards, a communication was made to Messrs. Fawcett and Shand, and they eventually consented to engage in the concern with Mr. Whitehouse. Before they finally decided, however, Mr. Shand himself went into Wales for the purpose of inspecting the works; and as he did not rely entirely on his own judgment, application was made to a friend of the parties, Mr. Jones Wilkinson, who was acquainted with business of that description, to accompany Mr. Shand for that purpose. After having carefully inspected the premises, Mr. Wilkinson and Mr. Shand returned to Mr. Fawcett, and the *repre- [*144] sentations which they made as to the state of the works, and the nature of the property corresponded with the representations of Mr. Whitehouse. Under these circumstances, Messrs. Fawcett and Shand determined to engage in the undertaking. Accordingly, on the 30th of November, in the year 1818, they proceeded, with the view of concluding the agreement, to Birmingham. A few days previous to that time, Mr. Whitehouse had instructed Mr. Fellowes, who was his own private solicitor as well as his solicitor for the purpose of the partnership, to draw up the agreement relative to the stipulation as to the 12,000*l.* The agreement so drawn entirely got rid of the provision with respect to the bond, and converted what was said to be

a loan, but was in fact a conditional advance, into an absolute gift. The agreement, in this shape, was delivered to Mr. Whitehouse, who, on the day before the meeting at Birmingham, employed the son of Mr. Fellowes to copy it, stating, as his reason for so doing, that he preferred employing young Mr. Fellowes to employing a clerk of the house, because he wished the transaction to be kept secret. On the next day the parties met by appointment at the Royal Hotel at Birmingham. Previous to the meeting at the Royal Hotel, a meeting was held at the Swan Inn, not of the partners of the firm of Knight & Co., but of the other parties. Much conversation took place on that occasion: and in the course of that conversation, it is sworn by three witnesses who were present, that Mr. Whitehouse stated to Messrs. Fawcett and Shand, that he had done as much as he possibly could for them; and that Mr. Fawcett or Mr. Shand said in reply, he was satisfied Mr. Whitehouse had done all he could for them, and that they wished him to finish the transaction, for they were wholly ignorant of mining concerns. They afterwards met at the Royal Hotel for the purpose of concluding the transaction. Some difference

[*145] *arose with respect to the terms of the agreement—as to whether it should be an assignment or an under lease; and Mr. Shand and Mr. Fawcett were willing so far to depart from the original arrangement as to agree that it should be an under lease, which Mr. Whitehouse at first objected to; but he afterwards acquiesced in the alteration. As soon as the terms of this agreement were arranged, the defendant called three of the partners of the house of Knight & Co. out of the room, for the purpose of settling with them the terms of his own private agreement. The agreement, as drawn by Mr. Fellowes, was handed to them. They objected to it as a departure from their original intention, which was, as it was stated, that the 12,000*l.* should be a loan, whereas it was now made an absolute gift. In consequence of the demur, some further negotiation ensued between the defendant and those members of the firm of Knight & Co. who where then present. On this point, the representation made by Whitehouse is material. He said, "I have procured you persons of respectability as partners in this concern; you run no risk; there is no chance whatever of the works being again thrown upon your hands; you ought, therefore, to release me from the bond, and not allow it to hang over my head." They acquiesced in these reasons. The stipulation relative to the bond was omitted, and the agreement was signed, with some alterations, as drawn by Mr. Fellowes. It was then delivered into the hands of young Mr. Fellowes, in order that he might get it stamped; and at that time the defendant stated his desire that he would show it to no living soul; and he at the same time represented, over and over again to Mr. Fellowes, that he would not sign the other agreement until this his particular and personal agreement had been previously executed.

[*146] *Such are the facts of the case; and the first observation that occurs is, that in this transaction Mr. W. was negotiating for himself and his future partners, as an agent for the intended partnership. That he was

acting as their agent, the circumstances of the transaction show beyond the possibility of doubt. It is sworn to in express and distinct terms by Mr. Hancock and Mr. Wilkinson, and it is evidenced by the conversation already referred to, which passed at the Swan Inn. It is said on the other side, that he could not be considered as absolutely the agent in the negotiation, but that Messrs. Fawcett and Shand acted for themselves in the manner which they thought most calculated to promote their own interest. Mr. Shand went himself to inspect the works, and he employed a friend, Mr. Wilkinson, for the purpose of accompanying him in his survey: they did not, therefore, absolutely rely on the representations of Mr. Whitehouse, but chose to have recourse to an agent of their own, in order to ascertain how far his statements were correct. Undoubtedly, that is the fact; they did not trust implicitly to the representations made by Mr. Whitehouse with respect to the property and the nature of the works, and they deemed it prudent to apply to another person for the purpose of learning whether those representations were true. But Mr. Wilkinson had nothing whatever to do with the treaty; the treaty was exclusively managed by Mr. Whitehouse. It is said, also, that at the meeting at which the transaction was finally completed, the terms originally stipulated for by Mr. Whitehouse were departed from,—and they certainly were departed from in one particular, in the adoption of an underlease instead of an assignment: and in that alteration, Messrs. Shand and Fawcett unquestionably acted for themselves, and Mr. Whitehouse acquiesced in it. But that does not in the least do away with the effect of this, that in all the arrangements *with respect to the pecuniary terms and conditions, the busi- [*147] ness was conducted entirely by Mr. Whitehouse, acting on behalf of Messrs. Fawcett and Shand. If, therefore, Mr. Whitehouse was placed in the situation of being the agent of two other persons, while he was acting also for himself, and he stipulated for a private advantage which was to be kept secret, and in which his co-partners were not to share, it is quite impossible for this court to sanction such a transaction: and the question therefore resolves itself into this, what was the effect of the private stipulation, and what the nature of the private advantage? We are not to be misled by terms; we must consider what the transaction really was. It is said this was a loan of 12,000*l.*, in order to enable Mr. Whitehouse to bring his capital into the concern. But it was not a loan properly so called: it was 12,000*l.* advanced without interest, and to be repaid only in a certain event; being, in effect, a gift upon condition, liable to be defeated if the covenants in the other and principal agreement were not duly complied with, and being intended to secure the due performance of them. That such was the nature of the transaction, is evidenced by the subsequent conduct of the parties, because the moment the partners were known, the moment it was seen that no risk was to be run, that representation was made by Mr. Whitehouse to the other parties:—"You are perfectly secure; these are persons of responsibility and character; there is no danger of the works being again thrown on your hands, and therefore there is no

reason why this bond should be allowed to hang over my head;" upon which they consented to withdraw the stipulation relative to the bond, and converted that which before was a conditional into an absolute gift. But whether it was conditional or absolute does not vary the nature or substance of the [*148] case. If it was a conditional gift, still it was a benefit to this party, who was one of the three individuals who entered into the partnership, and who himself negotiated the terms of it. It is impossible for this court to sanction such a proceeding: when three persons are engaged in negotiating a partnership, and the negotiation is conducted by one as the agent of the other two, he should not, in my opinion, be allowed to make a private advantage for himself. That he felt it was an improper proceeding is proved by his anxiety to keep it secret from his partners; and it was not till after a considerable time had elapsed that it came to light.[1]

It appears to me, therefore, upon these grounds, that the decision of the Vice Chancellor was correct; and that as to two-thirds of the sum of 12,000*l.* the defendant must be considered a trustee for the partnership.[2]

An objection was taken in point of form, that Hunt and the other new partners had been improperly joined as plaintiffs upon this record. When, however, the situation in which they stood is considered, that will appear to have been perfectly proper. Mr. Fawcett and Mr. Whitehouse had stipulated,

[1] Vide *Caldwell* v. *Leiber*, 7 Paige, 504.

[2] Vide *Lees* v. *Nuttall*, ante, 53. H. being a director of a joint stock company established for the building, purchasing, hiring and employment of steam vessels, purchased a vessel for 1340*l.*, and afterwards sold it to the company as from a stranger, for 1500*l.*, and charging the company with commission at one per cent., the broker's earnest money, and the expenses of the bill of sale to himself, there being but one bill of sale. "Under these circumstances," says the Vice-Chancellor, (Knight Bruce,) "is it possible for me, whatever may have been the secret intentions of Mr. Heathorn's mind when he bought this vessel—is it possible for a judge in a court of equity to hear him say that he bought it otherwise than as agent? I find it utterly impossible to do so, his own mode of proceeding has, in my opinion indelibly and inextricably fixed him with the character of agent from the beginning of that transaction." "It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees, and all parties whose character and responsibilities are similar (for there is no magic in the word,) induces the court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is entrusted by another) to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced—saying to the person complaining that he has thus employed his time and skill without remuneration, that he has elected so to treat the matter; that he has had his reward, for he has had the possibility, nay, the probability of retaining to himself that which he never ought to have retained; that he has been willing to run the risk, and cannot complain if he happens to lose the stake. It is on this principle that Lord Eldon proceeded in the cases so familiar to us all of purchases by trustees." *Benson* v. *Heathorn*, 1 Yo. & Coll. C. C. 326. But where the several joint owners of a cargo appoint one of their number their agent to receive and sell the cargo, and distribute the proceeds, he is entitled, under such special agency to a commission or compensation for his services, as a factor or agent, in the same manner as a stranger; and has a lien on the goods or their proceeds, not only for his advances, disbursements or responsibilities, in regard to the particular property, but for the balance of his general account. *Bradford* v. *Kimberley*, 3 Johns. Ch. Rep. 431.

when the new partners were admitted, that they should come into the concern entitled to all the advantages, and subject to all the conditions, of the original partners. Whatever benefits the old partners had enjoyed, it was stipulated should be shared in by the new. This was one of the original benefits of the concern; and as it was conceived that this was not expressed with sufficient distinctness, a deed was afterwards executed, by which it was expressly provided that, as to the proportion to which he was entitled, Mr. Fawcett should be a trustee for the Hunts, Kenrick, Priestley, and himself. I think, *therefore, they had such an interest as rendered it proper they should [*149] be joined as plaintiffs.

Under these circumstances, I am of opinion that the decree of the Vice Chancellor ought to be affirmed; and from the nature of the transaction, and the clearness of the evidence establishing its character, it ought to be affirmed with costs.

(A) The following passage, taken from the short hand writer's note of the Vice-Chancellor's judgment in the preceding case, sums up the grounds on which his Honor rested the decree:—"It appearing upon the evidence that Whitehouse was in truth the person who orignated the contract with Knight & Co. on the part of Fawcett and Shand, and it appearing also upon the evidence he represented, that he stood on so particular a footing of connection with Knight & Co. that he could have obtained better terms from them than any stranger could; and that he further represented, on the day when the agreement between Knight & Co. and Fawcett, Shand, and himself was signed, that he had obtained *the best terms possible*, I am of opinion upon these grounds, and considering the situation in which he stood, that he was not at liberty to take to his own profit any part of that consideration which Knight & Co. were willing to pay to get rid of the business, but that he was bound to obtain the best terms possible for the intended partnership, consisting of Fawcett, Shand, and himself, and that all he did obtain will be considered as if he had done his duty and had actually received the 12,000*l.* for the new partnership, as upon every equitable principle he was bound to do. I am of opinion, therefore, that this is what must be called in a court of equity a fraud on the part of the defendant. It was in fact selling his intended partners for 12,000*l.*; and when he received the money, Fawcett became entitled to one-third and Shand became entitled to another third of it. Shand is now entitled to his 4000*l.*, and Fawcett having communicated his interest in the former partnership to four other persons, they with him are entitled to the other 4000*l.*

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*(B) Hichens v. Congreve.[1] [*150]

This was a suit instituted by certain shareholders in the Arigna Mining Company, on behalf of themselves and all other shareholdors, except the defendants, against the chairman and acting directors of the company, and against certain other persons professionally connected with it. It appeared from the statement in the bill, that the company orignated with Sir William Congreve and two persons of the name of Clarke, by whose exertions chiefly it was orignated; that it was established for the purpose of working certain mineral property in Ireland, represented to be of great value, and of which it was proposed that the company should purchase a lease; and that Congreve and the Clarkes having been appointed to confidential and responsible situations in the management, took upon themselves to act for the common interests. The bill alleged, that in that capacity they were exclusively concerned on behalf of the company in negotiating the terms of the proposed purchase; that by a series of underhand contrivances, particularly set forth, they had succeeded in charging 25,000*l.* to the company as the consideration paid for the lease, although

[1] S. C. But on other points, 4 Russ. 562.

they had in fact obtained it from one Flattery, the owner, for the sum of 10,000*l.* only: and that the 15,000*l.* making up the difference had been received by the Clarkes, and been by them distributed in various proportions as a bonus among the several defendants. It charged that this distribution was made under such circumstances that all the defendants must, or at least on due inquiry might, have known the source from which the funds were derived; that as the appropriation had never been sanctioned by the rest of the shareholders, but, on the contrary, had been studiously concealed from them, it was a gross fraud upon the partnership; and that the defendants ought, therefore, in equity to be regarded as trustees to the extent of the sums they had received. And it prayed they might be decreed to refund what they had so respectively received, and pay it in to the bankers of the company for the use of proprietors at large.

[*151] *To this bill a demurrer for want of equity was filed by two of the defendants, not directors, who had received sums, part of the 15,000*l.*, as a bonus for their services in the formation of the company, in pursuance, as was alleged, of a previous stipulation, and with a knowledge of the manner in which the money was obtained. The Vice-Chancellor overruled the demurrer; and his order was on appeal affirmed by the Lord Chancellor on the 3d of May, 1828.

The answers of the defendants Congreve and the Clarkes set up in defence an alleged intermediate sale made to them on their private account, and before the company was in existence, for the sum of 10,000*l.* They insisted that 25,000*l.*, the price charged to the company, was no more than the property was worth; that as the original purchase had been made entirely at their own personal risk, the additional 15,000*l.* was a profit to which they were fairly entitled on the resale; and that the distribution of that sum was the result of a subsequent arrangement among themselves, by which they intended at once to stimulate and reward the exertions of the directors for the success of the new undertaking. They admitted, that in the conveyance, which was from Flattery directly to the company, no notice was taken of their intermediate contract, and that the full consideration of 25,000*l.* was expressed to be paid to him, although he received the sum of 10,000*l.* only; but this, they alleged, was done with his concurrence, merely to simplify the title, and without any intention of fraud or concealment, an intention which they positively denied. The answer of the Clarkes admitted that checks to the amount of 25,000*l.*, payable to Flattery or bearer, had been drawn on the company's bankers, and that the money due on those checks had been received by H. Clarke, who had paid him 10,000*l.* in cash and bank notes. The mode in which the remaining 15,000*l.* had been appropriated was particularly set forth; and it appeared that 2041*l.* had been retained by H. Clarke for himself, 1047*l.* had been paid to his brother J. Clarke, 3500*l.* to Sir W. Congreve, and that the residue, after deducting sundry small disbursements, had been apportioned in sums of not less than 1000*l.* each among the other defendants.

[*152] On the 22d of May, 1828, a motion was made on behalf *of the plaintiffs, that the defendants, Sir W. Congreve and the Clarkes, might be ordered to pay into court respectively such sums of money, part of the said 15,000*l.*, as appeared by their answers to be then in their hands.

Mr. *Horne*, Mr. *Sugden*, Mr. *W. Lee*, and Mr. *Pemberton*, for the motion.

The *Attorney General*, Mr. *Pepys*, and Mr. *Phillimore*, for J. and H. Clarke.

Mr. *Twiss* and Mr. *Loftus Lowndes*, for Sir W Congreve.

The Vice-Chancellor made the order.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

DOD *v.* HERRING. *Ex parte* HERRING.

1830; January 13.

If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award.

THE defendants were ship-owners and merchants, who between the years 1818 and 1824 had been concerned with a person of the name of Thompson in several commercial adventures to the South American provinces. On the 22d of November, 1827, before any final settlement of the accounts upon those adventures, Thompson became a bankrupt; and the plaintiffs, who were his assignees, filed the present bill to have the accounts taken, and the balance, which they alleged to be due to the bankrupt's estate, ascertained and paid.

To this bill the defendants put in a plea of an award and judgment. The award was pronounced under an order of court made at the trial of an action brought by the defendants against the bankrupt in Hilary term, 1826. The trial took place on the 23d of July, 1827, when by consent a verdict was taken for the plaintiffs in *the action for 10,000*l.* and 40*s.* costs, [*154] subject to the award of W. H. Maule, to whom all matters in difference between the parties were by the order referred. On the 26th of February, 1828, the arbitrator made his award, whereby the sum found due to the defendants was reduced to 4242*l.*, and judgment as of Hilary term, 1826, was thereupon entered up for that amount. The plea averred that all the accounts and mutual claims existing between the defendants and the bankrupt in respect of the dealings and transactions as to which discovery and relief were sought by the bill, were properly comprised within the terms of the reference, were fully and fairly brought before the arbitrator, and were finally adjudicated and determined by his award.(*a*)

(*a*) The averments of the plea are more fully stated by Mr. Simons, who has reported the case before the Vice Chancellor, 3 Sim. 143.

The defendants appealed from the judgment of the Vice Chancellor overruling the plea, and they also presented a petition in bankruptcy (which was brought on at the same time,) praying they might be at liberty to prove under the commission for the amount found due to them by the award and judgment. In addition to the facts set forth in the plea, the petition stated that, at a meeting before the arbitrator on the 30th of November, 1827, one Knight, as the attorney of the bankrupt, appeared and contended that the bankruptcy of Thompson annulled the submission, and that the arbitrator ought not to proceed, but the objection was overruled; that Knight then requested that the proceedings might stand over till assignees were chosen, that he might procure instructions from them, which was agreed to; that, after the choice of assignees, several further meetings were held before the arbitrator, all [*155] of which Knight attended; *and that at some of them one of the assignees was present, together with the solicitor to the commission.

The question of law raised by the plea (which was admitted to be correct in point of form) was argued very fully by the *Solicitor General* Mr. *Bickersteth*, and Mr. *Hull*, for the plea; and by Mr. *Rose*, and Mr. *Wakefield*, for the plaintiffs. Besides the cases cited in the court below, *Cooper* v. *Johnson*,(*a*) was referred to. At the close of the argument on the law, evidence was read establishing the allegations of the petition. It did not appear, however, that the assignee who attended before the arbitrator, took any part in the proceedings.

The Lord Chancellor said, that, if the assignees had authority in law to adopt the submission, and it seemed to be conceded that they had, as it was clear that they or one of them had gone to the meetings before the arbitrator, and when present had made no objection to the proceedings, he had a right to assume, as a jury would assume, that they did adopt them. He should, therefore, make the order prayed by the petition. His decision upon the plea became then a matter of form, merely affecting the costs; but as the point which it raised was important, and embraced a variety of considerations, he should take some time to consider of it.

Judgment upon the plea had not been given at the time when his lordship resigned the Great Seal.

(*a*) 2 B. & A. 394. As the Lord Chancellor's judgment proceeded upon a different ground, it has been thought unnecessary to insert a note of this argument.

*Burch *v.* Rich. [*156]

1830; January 18.

If a bill, after being filed, is then amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally drawn and signed by counsel.

In this case a draft of the bill was prepared and signed by counsel. It was afterwards greatly altered by the insertion of new matter introduced by the solicitor on his own responsibility, and in that shape it was engrossed and put upon the file. To the bill thus enlarged a demurrer was put in; whereupon the solicitor amended the draft, by striking out all the superadded matter and restoring it to the state in which it was originally settled; and then without having it resigned by counsel, he caused it again to be engrossed and filed.

The *Solicitor General*, and Mr. *Girdlestone* jun. now applied to have the amended bill taken off the file for irregularity, on the ground that it had never received the signature of counsel. The motion had been previously made before the Vice Chancellor and refused.

The signature adhibited to the original bill, it was argued, was *functus officio:* and having already served as a warrant for the draft as remodelled by the solicitor, it could not perform a double function and be again used to sanction the bill as it now stood. It might be true that the draft had at last got into the state in which it was originally signed: but the solicitor had chosen, most unjustifiably, to take advantage of the signature so obtained, in order to load the record with a great deal of objectionable matter: and he was not to be allowed when he discovered his mistake to disavow his own act, and ascribe the signature to a second and totally different bill. Such a practice was a wanton *trifling with the court, and if countenanced, would go [*157] far towards destroying the security which the signature of counsel was intended to afford. The utmost jealousy had always been exhibited by the court upon this subject. *French* v. *Deare*,(a) *Pitt* v. *Macklew*,(b) *Attorney General* v. *Fellows*,(c) which was the case of an amended information. The rule was, that wherever an amendment exceeded two folios, there must be a fresh engrossment; and as the solicitor had here gone to the expense of having the amended bill re-engrossed, the unavoidable inference was, that the amendments were not confined to merely striking out portions of the original bill; for in that case a new engrossment would have been unnecessary. *Webster* v. *Threlfall*.(d)

Mr. *Pepys*, on the other side, contended, that the bill as it now stood, had really received the necessary signature: there was an engrossment from a draft signed by counsel, and the practice required nothing more. The proceeding might have been improper at first; but all was right now. A

(a) 5 Ves. 547.
(b) 1 S. & S. 136, n.
(c) 1 J. & W. 254.
(d) 1 S. & S. 135.

counsel's signature could give no sanction to a bill altogether different from the one he had settled and subscribed. As the name stood at first on the record, therefore, it was perhaps mere surplusage, serving no purpose whatever; and that might probably have formed a ground, on a proper application for having the original bill taken off the file. But the previous irregularity could not vitiate the amended bill, every word of which had been prepared by counsel and sanctioned by his signature. It was not the fact that the name had been unduly used for a double purpose, for the new engrossment was superfluous, all the *amendments being mere elisions, and it was admitted that in that case it would be unnecessary to have he draft re-signed. The only object of the motion was to load the plaintiff with a vexatious expense.

[*158]

The Lord Chancellor was of opinion, that, as the bill at first put upon the file bore the signature of counsel appended to it, such signature must be presumed to have been used for the purpose of sanctioning that bill; but the rule being, that, wherever amendments are introduced, the draft ought to be re-signed, it was, he conceived, irregular in the plaintiff, after having had the benefit of the signature for one bill, to attempt, on abandoning his original case, to ascribe it to a second. The amended draft ought to have been signed afresh.

Motion granted.

[*159]

*Sheriff v. Coates.

1830; January 18, 21, 22.

Equitable jurisdiction upon the 34 G. 3, c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established.

In this case the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account.

The court will, itself, compare and decide upon alleged piracies by inspection, where that can be easily and safely done.

This was a motion to dissolve an injunction (originally granted *ex parte*) to restrain the defendants from using certain patterns employed in the printing of cotton goods, and from vending the goods so printed, the plaintiffs claiming an exclusive property in the patterns under the provisions of the calico printers' acts. By the first of these acts, 27 G. 3, c. 38, s. 1, which recites, that "it may be expedient for the encouragement of the arts of designing original patterns for printing linens, calicoes, cottons, and muslins, to vest the property thereof in the designers, printers, or proprietors for a limited time," it is for that purpose enacted, "That from and after the first of June, 1787, every person who shall invent, design, and

print, or cause to be invented, designed, and printed, and become the proprietor of any new and original pattern or patterns for printing linens, cottons, calicoes, or muslins, shall have the sole right and liberty of printing and reprinting the same for the term of two months, to commence from the day of the first publishing thereof, which shall be truly printed with the name of the printer, or proprietors at each end of every such piece of linen, cotton, calico, or muslin; and that if any calico printer, linen draper, or other person whatsoever, from and after the 1st of June, 1787, within the time limited by this act, shall print, work, or copy such original patterns, or cause to be printed or reprinted any such pattern or patterns, or shall print or reprint, or cause to be printed or reprinted, any such pattern or patterns, and shall publish, sell, or expose to sale, or in any other manner dispose of, or cause to be published, sold, or *exposed to sale, or in any [*160] other manner disposed of, any linen, cotton, calico, or muslin so printed, without the consent of the proprietor or proprietors thereof, first had and obtained in writing, signed by him or them respectively, in the presence of two or more credible witnessess, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors of such pattern, then every such proprietor or proprietors shall and may, if the offence be committed in England, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with costs of suit," &c. This act was at first temporary, but it was renewed by the 29 G. 3, c. 19, and finally declared perpetual by the 34 G. 3, c. 23, which, reciting that the first act had by experience been found to be beneficial, re-enacts its provisions, and extends the term of the exclusive privilege from two to three months.

The bill stated that the plaintiffs were the original inventors and owners of the patterns in question, and had fully complied with all the provisions required by the statute in order to invest them with the right of property. The defendants were Coates, a calico printer of Manchester, who was charged with having copied and pirated the patterns shortly after their publication,—Glover, who was Coates' agent and consignee in London, and who it was alleged had been concerned in the piracy, and had received and sold goods printed according to the pirated patterns,—and Leaf, who had purchased from Glover, and was re-selling large quantities of such goods, with a full knowledge, as it was charged, that they had been copied or pirated from the plaintiffs.

*The motion, which had been made without success before the [*161] Vice Chancellor upon affidavits, was now renewed before the Lord Chancellor on the coming in of the answers.

Sir *Charles Wetherell*, Mr. *Knight*, and Mr. *K. Parker*, for the motion:—A patent for so short a period as ninety days is a singular and most in-

convenient subject for the cumbrous and dilatory machinery of chancery to deal with. Long before the question of right, which depends on a number of other intricate questions of fact and law, could be discussed and determined, the exclusive privilege would have expired by lapse of time, and the court would be left to grapple with a shadow. The equitable interposition by injunction, which is always discretionary, would be peculiarly dangerous here, and might work grievous injustice; for the malice of a rival manufacturer, by getting up a plausible *ex parte* case, might be able to crush the invention of an ingenious artist, and rob him of his just reward; and before the truth could be discovered and the restriction withdrawn, the public taste might have taken a new direction, and compensation would then be impossible. This ephemeral species of monoply is suited to the fluctuating nature of fashion, to which the prints owe their short lived popularity and value; and when the legislature thought fit to encourage them by securing to the inventor an exclusive privilege, it also pointed out an appropriate and summary remedy against infringement. The remedy, by a special action on the case, was given, because an injunction would have been absurd. Such an injunction, indeed, was never heard of. Although the statute has existed nearly half a century, this is the first time a court of equity has [*162] been summoned to assist in establishing a right under it, and *even at law it has seldom or never been enforced;(a) a circumstance which of itself should be a reason for declining to interfere now.

Upon the sound construction of the calico printers' act, no right of property is vested in the inventor, and if so, there can be no jurisdiction. That act is framed very differently from the analogous statutes on which the copyright of authors and engravers(b) is founded; all of which, in distinct terms, confer or recognize the property independent of the penalties or forfeitures given to protect it; they first create the exclusive privilege; then, in a separate section they declare that the pirated books and engravings, as well as the plates, shall be liable to be seized and destroyed; and finally they declared a general right of action or suit in the proprietor against the pirate. Here, however, there is nothing of the kind. As the privilege, whatever be its nature, has no existence at common law, any more than ordinary copyright,(c) it must be strictly measured by the words creating it, which form together one entire and connected clause, and bestow on the inventor one particular species of right and no other; that, namely, of proceeding against parties infringing by a special action on the case. As to the defendant Leaf, the statute clearly cannot apply; for he is sought to be charged simply as a vendor of goods, knowing the patterns to be pirated: which sup-

(a) But see *Mackmurdo* v. *Smith*, 7 T. R. 518.

(b) The acts relating to authors are 8 Ann. c. 19, and 54 G. 3, c, 156; those relating to engravers are 8 G. 2, c. 13, 7 G. 3, c. 38, and 17 G. 3, c. 57.

(c) *Millar* v. *Taylor*, 4 Burr. 2303.

posing the fact of knowledge could ever be made out, would not be enough. It is not alleged that he was himself guilty *of piracy by [*163] printing or reprinting those patterns, although, as the two members of the sentence are in the conjunctive,—"if any person shall print or copy such original pattern, or shall print or reprint, or cause to be reprinted, any such pattern, *and* shall publish, sell, &c., knowing the same to be printed, without the consent," &c.,—the two circumstances of printing or reprinting from an original pattern, and of publication with knowledge, must concur, in order to bring him within the scope of the enactment. Against the other defendants the statute expressly prescribes a particular mode of obtaining relief, to which the plaintiffs ought to have resorted; and that by implication excludes every other. *Parry* v. *Owen*,(*a*) and the dictum of Sir A. Hart[1] in Sim. 499.

THE LORD CHANCELLOR said that in his opinion the jurisdiction of equity was not excluded by the operation of this clause.

For the motion.—Upon the whole, the plaintiffs should be left to bring their action, and if they fail, as they must, against Leaf upon the statute, and against the others upon the evidence, their title to come here will be completely negatived. In the mean time the injunction should be dissolved: for there can be no pretence of long enjoyment and possession by the plaintiffs; and the evidence as to originality is conflicting. *Hill* v. *Thompson*.(*b*) A bare inspection will satisfy the court that great part, if not the whole, of the designs in these supposed original patterns is as old as the manufacture itself, and therefore incapable of appropriation; on that ground also the plaintiffs should be left to their legal remedy. *Baily* v. *Taylor*.(*c*)

[*It was then agreed that, as the right to several patterns was in [*164] contest, the evidence of piracy in one or two only should be gone into, and that the other cases should follow the judgment in the first.

THE LORD CHANCELLOR observed, that as this was a case capable of inspection, the court would exercise a *prima facie* judgment upon it without referring the question, as was usually done, to the master.

Some of the patterns were accordingly handed up to his Lordship, and were pronounced to be very much alike; some slight differences were also pointed out. The designs were extremely minute, and consisted of waiving or dotted lines, with a leaf upon a uniform ground. The answers denied that they were new, or invented by the plaintiffs.]

The *Solicitor General*, Mr. *Burge*, and Mr. *Wray*, for the plaintiffs:—Admitting that there is a conflict of evidence, we are ready to take an issue on the point of novelty, provided the injunction is allowed to stand. No remedy is so easy and expeditious in a case of this kind as injunction. The

(*a*) 3 Atk. 740. (*b*) 3 Mer. 622. (*c*) 1 Russ. & My. 73.

[1] "Whenever an act gives a right, it means to give a legal remedy, and not to put the party to the extraordinary remedy of a court of equity."

bill may be filed and the order obtained one morning, and you may come the next, or as soon as the affidavits are prepared, to have it dissolved. The objection that the transitory nature of the right renders it an improper subject for equitable jurisdiction, applies much more strongly to the courts of law, where the delay would be infinitely greater, and the remedy, when obtained, exceedingly imperfect, being retrospective only, and not, like the remedy here, prospective also. Our object is not so much to recover damages for the loss we may have sustained by the piracy, as to vindicate and es-
[*165] tablish our rights in future. The pirated patterns *are very numerous, and to bring actions for the penalties on them all would be troublesome and expensive. In proceeding under the statute, besides, technical difficulties might occur, which would render the resort to law a very hazardous experiment. If the construction contended for be correct, we should certainly be nonsuited in an action against Leaf; and it is quite possible that we might fail in actions under the statute against all the three defendants, and yet, as having the undoubted right of property, be entitled to call for the protection of this court. Our title to relief against all the parties is founded upon two simple facts—the originality of our patterns and the imitation by the defendants,—facts which can only be properly tried by issues directed out of chancery. For these reasons, we have rather chosen to pass by our common law remedy and come at once here. If we have a property in the patterns, that course was unquestionably open to us. The additional redress by a special action on the case cannot, nor was it intended to take away the remedy inherent in the right of property which we claim: we can be no worse off than if the statutory relief had not been granted. Equity frequently interferes, and that is its peculiar province, to recognize and protect a right for which no action is maintainable at all; for example, in waste.

The only remaining question is as to the existence of a property in these designs. An attempt has been made to argue that the right of property and of action are in the statute so intimately blended as to be incapable of subsisting separately: but that is a perversion of the act. To say nothing of the preamble, which is express, the words at the beginning of the enacting part are as strong as possible,—"that every person who shall invent patterns, &c. shall have the sole right of printing and reprinting the same,"
[*166] which is almost in terms the language used in the copyright and *engravers' acts; and they have always been admitted to confer a property in the works, independent of the remedies given by the subsequent provisions. *Beckford* v. *Hood*.(a) The remedies afforded by those acts by means of forfeitures and penalties can make no possible difference as to the right created by the previous section. Here the enactment is much shorter, being all compressed into one section, but it consists of two distinct and easily

(a) 7 T. R. 620.

separable clauses. Under the first, which confers the property, the inventors may come here to prevent the manufacture of any goods of pirated patterns, whether they are sold or not, within the statutable period; whereas under the second there must be a publication and sale, as well as piracy, in order to found the right of action. And yet unless there is protection against both, the object of parliament in encouraging the invention would be in a great degree frustrated, for otherwise the goods might be got ready within the three months, and poured into the market the moment the period had elapsed.(a)

*An injunction is often granted independent of the right to an ac- [*167] count, which here is comparatively a matter of indifference: and although the legal title may appear doubtful, the court will continue it, when once granted, till the hearing, wherever the mischief arising from infringement, as in a patent like the present, would be irremediable. *University of Oxford* v. *Richardson*.(b) That part of the designs of these patterns has been long known is no objection, provided the rest be original. *Hogg* v. *Kirby*.(c)

Sir *Charles Wetherell*, in reply.

The Lord Chancellor, after reading the preamble of the 27 G. 3, c. 38, and the enacting part of the statute, proceeded as follows:—It does not appear to me that the provisions by which a remedy is given by the act, for infringement of the right, takes away the jurisdiction of this court.[1] That jurisdiction is in my opinion founded on the first part of the clause, which gives the right of property; and which I consider to be a substantive and independent part of the act. It was said that the court ought not to interfere, on account of the small value of the property in litigation. It is true, that as to the particular pieces of calico, or possibly as to the individual pattern, it may not be of much value. But considering this as a general question,

(a) Crossley v. Beverley. Crossley v. Derby Gas Light Company.

1829; December 4

Injunction granted generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured while the patent was in force.

The plaintiff was the assignee of a patent granted in 1815, for the manufacture of gas meters of a peculiar construction, and had recently succeeded in establishing his right by recovering a verdict at law. The patent was to expire in the course of a few days.

The *Solicitor General* and Mr. *Cooper* moved *ex parte*, on the bill, which was verified by affidavits proving the infringement, that the defendants might be restrained from selling or disposing of any of the gas meters in question which had been piratically made during the continuance of the patent. The defendant, it was suggested, had a large stock of the pirated articles on hand ready to be thrown into the market, as soon as the monoply was at an end; which they had no right to do to the detriment of the plaintiff, who had the exclusive privilege of manufacturing them during the fourteen years.

The Lord Chancellor granted the injunction.

(b) 6 Ves. 689. (c) 8 Ves 215.

[1] Vide *The Attorney General* v. *Aspinall*, 2 Myl. & Cr. 613, 628, 633. *Coats* v. *The Clarence Railway Company*, post, 185. *The Attorney General* v. *Wilson*, 9 Sim. 30, 49. S. C. Cr. & Ph. 1.

and as one affecting the manufacture, the subject is one of great
[*168] *value and importance, and entitled to the protection of the court; and there is no reason, why, if the right of property is violated by piratical imitation, this court should not interfere.

In this case there seem to be two questions, first, as to there being a piratical imitation; and, secondly, as to the originality of the pattern. As to the first, I entertain very little, if any doubt. It appears that, after the original was drawn and printed, a specimen of it was sent to Coates through the medium of Glover, and Coates, after he had seen this specimen, drew the pattern which is supposed to be the imitation. That pattern has been produced to the court, and, on inspection and comparison of it with the other, I can perceive no difference, or a difference so slight, as to be colorable only. Secondly, as to the originality, it is essentially necessary that the party applying for equitable interposition should establish the originality of the pattern in a court of law. Here it is at all events impossible to come to any satisfactory conclusion upon that subject, since, from the difficulty of sifting the evidence, and the want of a power to cross-examine the witnesses, I feel myself wholly incompetent to pronounce whether this is or is not an original pattern. The only remaining question is, whether that point will be best determined by an action or an issue? My original impression was in favor of the former; but in this case it becomes an important consideration, that, from the language of the statute, the question cannot be properly tried in one action. An action cannot be maintained against Coates, Leaf, and Glover. To try it properly there must have been at least two actions: one against Coates the printer, and another against Leaf and Glover the vendors with knowledge. But here the question of originality may be tried in the shape of an issue, giv-
[*169] ing the party also the opportunity if he *chooses, and thinks it worth his while, of trying the question of piratical imitation in a second issue. In the mean time I shall direct the injunction to be dissolved, and the parties to keep an account of the profits of their sales. For it may turn out, on the investigation at law, that the pattern is not original; and the property might be destroyed by continuing the injunction till the result of the trial. As to the other cases, I think I ought to dispose of them in the same way: for though the evidence in one of them is certainly stronger against the claim of originality; yet as there was no opportunity to cross examine the witnesses, I cannot satisfactorily decide, without sending the question to law.[1]

[1] Vide *Bayley* v. *Taylor*, ante 73.

Lushington v. Sewell.

1830; January 29.

A testator by will gives his moiety of an estate called H., to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other: Although the devise fails as to the after purchased moiety, the charge is good for the whole sum, and equity will make no apportionment.

M. G. Lewis, by his will bearing date the 5th of June, 1812, gave and devised all his real and personal estate to certain trustees upon trust, as to one moiety, for his sister Lady Lushington for her separate use for life, and after her decease, for all the children of Lady Lushington who should be then living, as tenants in common, and their heirs, executors, administrators, and assigns: and as to the other moiety, he gave and devised the same, upon similar trusts, for his sister Mrs. Sheddon and her children.

The testator afterwards executed a codicil without date, which, after making some observations with respect *to his will and the nature [*170] and amount of his property, and the best mode of discharging his debts and legacies contained in this passage: "It is my intention that my estates which I have bequeathed to my sisters should not be divided equally between them, but in proportion to the number of their children at the time of my decease."

Another codicil, bearing date the 1st of November, 1815, was in these words: "To prevent disputes, I leave to my eldest sister Lady Lushington and her heirs my estate of Cornwall in Jamaica, and to my youngest sister, Mrs. John Sheddon and her heirs, I leave my property in the estate of Hordley in Jamaica, the numbers of their respective children nearly equalising the value of the two properties."

A third codicil bearing date the 20th of August, 1816, gave a variety of directions for the management of the testator's West India property, and for the treatment of the negroes belonging to it. It also imposed on the devisees of the Cornwall estate certain conditions, requiring them to reside periodically in Jamaica. It then continued as follows:—"I have bequeathed my estate of Cornwall to my eldest sister and to her children after her death. If no one of these persons will accept it on the above conditions, or neglect to fulfil it after acceptance, then I declare the estate to be forfeited to my youngest sister, and to her children after her death, upon the same conditions. If no one of these persons also will fulfil this condition, then I declare the estate to be forfeited to that one of my next heirs who shall be willing to perform it, to be forfeited by him or her also upon non-performance. I bequeath my estate of Hordley to my youngest sister, and to her children after her death, upon exactly the same condition of passing three months in Jamaica once in every three years, *which I have above imposed respecting Cornwall. [*171] And if no one of these persons performs this condition, then I declare

Hordley to be forfeited to my eldest sister, and to her children after her death, upon the same conditions, and if those conditions are not fulfilled, then Hordly (as well as Cornwall) shall pass to my next legal heir who will perform them. Whether I possess the whole or only the half of Hordley at the time of my death, I declare that the more or less shall make no difference. In that case I bequeath the whole of Hordley to my youngest sister, and to her children after her death, but I charge it with 15,000*l.* to be equally divided between the children of my eldest sister, to which purpose one-half of the clear profits of Hordley shall be devoted till the whole 15,000*l.* shall have been discharged."

At the time when these several instruments were executed, the testator was the owner in fee of the Cornwell estate in Jamaica, and also of one moiety of the Hordley estate in the same island. At a subsequent period, in the month of October 1817, he entered into a contract for the purchase of the other moiety of the Hordley estate at the price of 32,000*l.*: and on the 10th of May, 1818, before the conveyance of that moiety had been completed, he died, leaving his sisters Lady Lushington and Mrs. Sheddon, his co-heiresses at law, the former with ten, the latter with five children, then living.

The facts of the case, and the different testamentary papers of Mr. Lewis, are stated more at large in the report of the cause on farther directions before Sir A. Hart, then Vice Chancellor.(*a*) The will of the 5th of [*172] *June 1812, and the codicils of the 1st of November 1815, and of the 20th of August 1816, had been declared well proved at the original hearing. Mrs. Sheddon died soon after the institution of the suit. The decree made upon farther directions (among other things) declared, that the moiety of the Hordley estate, whereof the testator was seised at the time of making his last codicil, passed, by the will and codicils to the children of Mrs. Sheddon, and was charged with the sum of 15,000*l.* for the benefit of the children of Lady Lushington living at the testator's decease; and that the freehold of the moiety of the Hordley estate, purchased by the testator after the making of his last codicil, descended to his sisters, as his co-heiresses at law. (*b*)

(*a*) 1 Sim. 435.

(*b*) In pronouncing his judgment in court, the question as to the charge of the 15,000*l.* on Hordley, though raised in the argument (1 Sim. 464,) appears to have been overlooked by his Honor. But he referred to it particularly in the written judgment which he afterwards sent over from Ireland, and in conformity with which the decree was drawn up. His reference was in these terms:— "Mrs. Sheddon and her children take the moiety of the Hordley estate which the testator was seised of at the time of making his will. The testator contemplated the acquisition of the other moiety, and with a view to equalise the sisters, he has charged the sum of 15,000*l.* on his Hordley estate, whether more or less. The will can have no operation on the moiety subsequently acquired, and his original moiety must bear the charge. I must therefore declare, that the moiety of the Hordley estate which the testator devised for the benefit of his sister Mrs. Sheddon, and her children, now belongs to the children of Mrs. Sheddon, subject to the payment of 15,000*l.* to the children of Lady Lushington."

The children of Mrs. Sheddon appealed against so much of that decree as charged the devised moiety of the Hordley estate with the legacy of 15,000*l* for the children of Lady Lushington.

*Mr. *Horne*, and Mr. *Burge* for the appellants:—The appellants [*173] claim nothing under the last codicil. The testator's original moiety of the Hordley estate was well devised to them by the previous codicil of November, 1815, upon which alone they are perfectly content to rest their title. The other moiety not having been purchased till October, 1817, could not pass by the codicil executed in August, 1816; nor was that codicil necessary, and it was not intended to pass the moiety which had already been effectually given.

The only question therefore, is, whether the words of an instrument, which as a devise, is wholly inoperative, shall operate to create a charge upon the estate assumed to be given by that devise. The spirit and intention of these testamentary provisions are directly contrary to such a construction. The whole of them evince, from first to last, an anxious desire on the testator's part to put the families of his two sisters on an equal footing; as he himself expresses it, "to divide the estates bequeathed to his sisters in proportion to the number of children at his decease." His very object, indeed, in framing the proviso on which the respondents rely, was to maintain this wished for equality: he feared he might otherwise destroy it, should he carry into effect the purpose, then obviously in his mind, of purchasing the remaining moiety of the Hordley estate. That moiety, it appears was worth about 30,000*l.*; so that if it had passed to the Sheddons, as he supposed it would, under his will, along with the original moiety, the charge of 15,000*l.* in favor of Lady Lushington's children became requisite, with a view to preserve the proportionate adjustment of interests between the two families. The charge then was to operate, if the Sheddons took both moieties of the Hordley estate, and in no other event. *To hold that it subsists, notwithstand- [*174] ing they take one moiety only, would utterly defeat the testator's declared object, and be extremely unjust to the appellants, whose beneficial interest under their uncle's will would be thus cut down from 45,000*l.* to 15,000*l.* for the benefit of the other family. The language of the codicil, besides, does not fairly warrant that construction. Paraphrased, it would naturally run thus:—"Whether I possess the whole or the half of Hordley at the time of my death, I declare that the more or the less shall make no difference;"—in other words,—"shall make no alteration in my testamentary disposition of it; in that case (that is, should I then possess the whole,) I give it (the whole) to my youngest sister, and her children; but I charge it (meaning again the whole,) with 15,000*l.*," &c. Now, at his death, he did possess the whole; but he did not, and till he did possess it, he could not legally devise it as a whole. The clause giving and charging the estate forms one continuous and connected sentence. In common sense, therefore, the burden was inseparably annexed by way of condition to the gift vainly at-

tempted to be made of the entirety; and as that gift never took effect, the condition did not arise. Supposing, however, that the codicil could operate at all as a devise, (which we deny,) still, as the 15,000*l.* is charged upon the whole, not of what the appellants took, but of what the testator professed to give, and as they can at any rate claim but one moiety, the charge ought in equity to be reduced to the same proportion.

Mr. *Pemberton*, Mr. *Lovat*, and Mr. *Preston*, for the respondents, the children of Lady Lushington:—All these arguments were urged [*175] before the Vice-Chancellor, and overruled. It is a mistake to *say that the appellants take nothing under the codicil of August, 1816: they take one moiety under it. No doubt the testator meant they should have both; but because the law will not allow his gift to operate as to the entirety, it is not the less effectual as to the part which he could devise. The whole of the testamentary papers must be read together and construed as one instrument, speaking at the time when the last was executed; and the codicil of August, 1816, being the latest, nullifies all the preceding ones, so far as they are inconsistent with it. The devise of the moiety of Hordley is of course superseded by the subsequent devise of the whole; for it will not be pretended, that if a testator gives the whole of an estate, when in fact he possesses a part only, no part of that estate shall pass. In the early part of the codicil of August, 1816, Mr. Lewis devises it by the description of "my estate at Hordley." All that the testator therefore could give, namely, one moiety was disposed of by that codicil, and the very clause which repeated the gift, at the same time charged it—whether it were more or less—whether the whole or a half, (for that is the meaning of the words, and not the gloss put on it by the appellants,)—with the sum of 15,000*l.* for Lady Lushington's family. The construction contended for on the other side does violence to the language of the instrument. In case the testator possessed the whole at his death (which he did,) then he bequeathed the whole to his youngest sister and her children; but in the same breath he charged it, that is, the whole and every portion of it—all that they took under the will (and the more or less was to make no difference)—with the legacy of 15,000*l.* If the devise had been ineffectual even for a moiety, and Mrs. Sheddon had chosen to claim it as one of the co-heiresses at law, still as against her and her real representative, who is one of the [*176] appellants, the legatees *would have had a right to put them to their election. *Thellusson* v. *Woodford*.(*a*) It is urged that the testator creates the charge only in the event of the Sheddons taking the whole; in other words, that it is imposed on the whole only, and not also on any and every part. That might be his meaning; but he has not so expressed himself; and it is perfectly settled that a charge does not fail, because the

(*a*) 1 Dow's P. C. 249, affirming the judgment of the court below, reported in 13 Ves. 209. So Anon. Gilb. E. R. 15.

gift, to which it is annexed, has partially failed; so long as any thing remains on which the burden may attach, it subsists; and in such a case there can be no apportionment. *Sheddon* v. *Goodrich.*(*a*) As to what the testator might have done had he known that the after purchased moiety would not pass, it is idle to speculate: it is enough that he has not contemplated that circumstance, and made no provision for it. The hardship (if that could be regarded) is by no means so great as is supposed; for the respondents must contribute out of their share of the personalty one-half of the price of the after purchased moiety. Possibly the younger children of Mrs. Shedden might be entitled to some relief, on the principle of election, against their eldest brother and Lady Lushington, who claim by descent the undisposed of moiety; but that question has not been raised, and in the present state of the record it cannot be regularly discussed.

The *Solicitor General*, for Lady Lushington.

Mr. *Horne*, in reply.

*THE LORD CHANCELOR:—I have heard the argument to the close, [*177] on account of the amount of the property at stake, but I see no reason to differ from the opinion I threw out in the course of the argument, and which is in conformity with that expressed by the present Lord Chancellor of Ireland. The question is as to the effect of the subsequent codicil. The testator, at the time when the will and first codicil were made, was in possession of one moiety of the Hordley estate: and he devised it by the first codicil to his younger sister and her children. At the time when the second codicil, upon which the present question turns, was executed, it was contemplated that he might be in possession of the other moiety of the Hordley estate; and the codicil was accordingly framed with that view. The words of the codicil are these,—"Whether I possess the whole or only half of Hordley at the time of my death; I declare that the more or less shall make no difference. In that case" that is, in case I am proprietor of Hordley at my decease, an event which has happened, "I bequeath the whole of Hordley to my younger sister, and to her children after her death. But I charge it," that is, the whole of Hordley, "with 15,000*l.* to be equally divided between the children of my elder sister." By that codicil, therefore, he bequeaths, in the event which has happened, the whole of Hordley to his younger sister and her children; but charged with a sum of 15,000*l.* for the benefit of the children of the elder sister. It turns out, however, that by the operation of a rule of law, the devise, as to one moiety of that estate, fails: but the charge, in my opinion, subsists notwithstanding, and takes effect with respect

(*a*) 8 Ves. 481. *Buckeridge* v. *Ingram*, 2 Ves. jun. 652. See also *Hooley* v. *Booth*, 2 Vern. 359. *Tyte* v. *Tyte*. 1 Vern. 270. *Parker* v. *Lamb*, 3 B. P. C. 12, Tomlins' ed. *Oke* v. *Heath*, 1 Ves. sen. 135. *Holmes* v. *Goodworth*, June, 1831, before Lord Brougham, C. post. As to a charge on stock legacies, which partially fail by ademption, see *Humphreys* v. *Humphreys*, 2 Cox, 184. *Browne* v. *Groombridge*, 4 Mad. 495.

to the moiety of the Hordley estate which passed under the devise. The decree of the Vice-Chancellor must be affirmed.[1]

[*178] *NORTON *v.* WOOD.

1830; February 6.

At the time of executing a bond to secure a sum of money, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest be regularly paid: the letter is a binding undertaking.

Payments of interest made one or even two days after they became due, are no defeasance of the undertaking, if the grantor accepts them without objection.

ONE of the plaintiffs was indebted to the defendant in the sum of 6000*l.*, to secure the repayment of which, with interest, the other plaintiffs joined with the principal debtor in executing a bond for the amount; and at the same time stipulated for and obtained from the obligee a written memorandum, which was in these terms:—"15th April, 1826. Mr. B. Norton and Mr. W. Norton. Gentlemen, If the interest on the money, say 6000*l.*, be regularly paid, it is not my intention to call in the amount for four years from this day. I am, &c. John Wood."

The obligee having commenced an action on the bond, the bill was filed to have the benefit of the undertaking, and to stay the proceedings at law. The answer, stated that the plaintiff, W. Norton, had paid to the defendant the following sums in respect of the interest of the said 6000*l.*—on the 15th of October, 1826, the sum of 150*l.*—on the 17th of April, 1827, the sum of 150*l.*—on the 16th of October, 1827, the sum of 150*l.*—on the 15th of April, 1828, the sum of 150*l.*—and on the 14th of October, 1828, the sum of 150*l.*; and that the plaintiff had in manner aforesaid paid to the defendant the interest of the whole of the sum of 6000*l.*, down to the 15th of October, 1828, which was admitted to be the last half yearly day of payment: but the defendant denied that such interest was in all instances regularly paid, inasmuch as the same was payable on the 15th of April and the 15th of October in each year; whereas, in one of the cases above mentioned, it was [*179] not paid till *the 17th of April, and in another till the 16th of October.

THE VICE CHANCELLOR was of opinion that the memorandum amounted in equity to a good undertaking in the first instance, but that, under the circumstances stated in the answer with respect to the manner in which the interest had been paid, it had ceased to be binding on the defendant, and he therefore dissolved the injunction.

Mr. *Bickersteth*, on moving to discharge that order, submitted, that the Vice Chancellor's construction of the memorandum was right, but that no

[1] Vide *Welby* v. *Rockcliffe*, post, 571.

breach of the condition had ever taken place. On one occasion the interest had been paid a day before it became due, and it had once been too late by a single day, and once by two days; but these were mere accidental slips, the benefit of which, if they could not be relieved against in equity, was waived by the defendant accepting the money without objection at the time, and by continuing to receive other payments, which were made on the proper days.

Mr. *Barber*, contra, contended that this memorandum imposed no obligation on the grantor, but was simply an expression of his intention, which circumstances might induce him to change. The bankruptcy of the principal debtor had occurred since, which altered the case very materially. At any rate, there had been what would amount to a breach of the condition at law; for the interest had not been regularly paid at the day, and if the defendant was to be held strictly to the terms of his agreement, under a state of things so very different, so in fairness should the plaintiffs. If the scales were held evenly between the parties, they would be left *to their [*180] legal remedies. The acceptance of the interest, which was a debt due independant of the memorandum, could be no waiver.

The Lord Chancellor:—The question, whether payment of interest tendered after it is due, and accepted by the creditor, is or is not a regular payment, is one which at law would be left to the jury. As to the construction to be put upon the memorandum, I agree with the opinion of the Vice Chancellor;[1] and then, the only remaining question will be, whether this amounts to a regular payment of the interest. Upon that point I feel myself bound to express a different opinion from that entertained by his Honor. I think, if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment, if the person receives it the day after without making any objection. The order of the Vice Chancellor must be discharged; but if any interest has since become due, it is competent to the defendant to move to dissolve the injunction.

[1] But where an obligee indorsed upon the bond, a memorandum that he forgave a portion of the debt, and afterwards a suit at law was brought to recover the whole amount of the bond, the court refused an injunction, (the plaintiff offering to pay the balance,) as he gave no consideration for the alleged release. *Tufnell* v. *Constable*, 8 Sim. 69.

[*181] *COATS *v.* THE CLARENCE RAILWAY COMPANY.

1829; August, November. 1830; January.

A railway company, in exercise of the powers conferred on them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill, if the arch were of the proposed dimensions, but that the injury would be avoided, if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specified dimensions.

AN act of parliament, passed in the ninth year of G. 4, incorporated a number of persons under the name of the company of proprietors of the Clarence railway; gave them the powers necessary for making a railway through certain specified districts; and, for that purpose, authorized them to enter into, and do various acts in and upon, the lands of all persons whomsoever; at the same time, providing that the company should do as little damage as might be in the execution of the powers conferred on them, and that they should make, to the owners and occupiers of, and all persons interested in, any hereditaments which might be taken, used or injured, full satisfaction for all the damages sustained by reason of the execution of such powers: And—for settling all differences which might arise between the company and the owners and occupiers of, and the persons interested in, the hereditaments, which might be set out and ascertained for making the said railways or tramroads, and other works and conveniences, or which might be otherwise affected or prejudiced by the execution of the powers thereby granted, touching the purchase money to be paid, or recompense to be made respectively, for or in respect of the same—it was, amongst other things, enacted, that, if any person, seised or possessed of, or interested in any such hereditaments, should not agree with the company for the sale and conveyance of their interests therein, a jury should assess and ascertain the sum or sums of money to be paid for the purchase of such hereditaments, and also what separate and [*182] distinct *sum or sums of money should be paid by way of recompense, either for damage which should before that time have been sustained, or for the future temporary or perpetual continuance of damage, the cause or occasion of which should have been only in part obviated, repaired, or remedied. A subsequent clause enacted, that the company should, at their own costs and charges, make, or cause to be made, such arches, tunnels, culverts, drains, or other passages, over, under, or by the side of the railways or tramroads, and the fences on the sides thereof, and of such depth, breadth, and dimensions, as should be sufficient at all times to convey the water clear from the lands adjoining or lying near to the said railways or tramroads, without obstructing or impeding the same, to the prejudice of any of the said lands or grounds.

The bill was filed against the company by the owner of a water corn-mill,

and of a mill-race, by which water was conveyed from a neighboring brook. It stated that the intended railway was to pass over this mill-race; that, in pursuance of such intention, the company were about to build a bridge over the mill-race, as a foundation for a large and heavy embankment, on which the railway was to be constructed; that the proposed dimensions of the bridge were insufficient for the effectual support of the embankment and the railway, and too small to secure at all times the free passage of the water; and that the intended works, if executed in the manner then contemplated, would greatly injure the plaintiff's mill. Part of the relief prayed was, that the company might be restrained from building over the mill-race any bridge of the dimensions, size, and construction thereinbefore specified, or any other bridge, unless the same should be of such dimensions and strength as would effectually support the embankment *and railway, permit [*183] the water to pass to and from the mill as freely and uninterruptedly as theretofore, and leave to the plaintiff the benefit of the several ways and passages then enjoyed by him on the banks of the mill-race.

The plaintiff moved for an injunction; and, after some discussion, an order was made by consent, referring it to an engineer to report, whether the mill would sustain, in respect to the flooding and supply of water, any and what injury from the execution of the proposed works; and the company were to be at liberty, in the mean time, to proceed in the erection of their bridges undertaking to abide by any further order of the court respecting them.

The engineer reported, that the mill would sustain injury as well from the retardation of the stream in passing through an arch of the figure and dimensions of the passage proposed to be left for the mill race under the intended embankment, as from occasional obstructions of the archway during winter by the accumulation of ice and wreck, which it would be extremely difficult, if not wholly impossible, for the miller to remove; and that, in order to secure to the plaintiff the same enjoyment of the working power of his mill as he would have had if the Clarence railway had not been constructed, the arch over the mill race ought to be of certain dimensions therein specified.

The defendants now moved that the report of the engineer might be rescinded, or not confirmed; that they might be discharged from their undertaking; and that they might be allowed to proceed generally with their works.

*The *Solicitor General* and Mr. *Ching*, for the motion. [*184]

Mr. *Bickersteth* and Mr. *John Wilson*, contra:—In support of the motion, it was contended, that the conclusion, to which the engineer had come, was contrary to the evidence, and that the proposed works would not inflict any injury on the plaintiff. But admitting that some injury might ensue, the court had no jurisdiction. The act of parliament had pointed out the only remedy to which the plaintiff was entitled; it had given him a

right to compensation, and had fixed the mode in which the amount of compensation was to be ascertained. He might claim that compensation, but he could not call upon the court to prevent the company from exercising the powers which the act of parliament had conferred on them. The case would be different, if the company were proposing to do what the act of parliament did not authorize; but there were no suggestion to that effect; it was not even hinted that they were exceeding their powers. The complaint was merely, that, in doing what the act empowered them to do they were about to inflict injury on the plaintiff's property.

On the other hand, it was argued on behalf of the plaintiff, that the right to compensation, given by the act of parliament, did not exclude the regulating and restraining jurisdiction of the court: and that nothing would be more pernicious than to hold, that the large and ample powers, conferred by such acts of parliament, were not subject to any control.[1] The company were not to be prevented from doing any thing which was necessary to the due prosecution of their undertaking; but, on the other hand, they were not to prosecute it in such a manner as to do unnecessary injury to others. They had a right to build a bridge over the mill race; [*185] *but a bridge of the dimensions which they proposed to erect would lessen the working power of the mill, while a bridge of somewhat larger dimensions would leave it unimpaired. Why, then, were they to be permitted to exercise their powers in such a manner as would be injurious to the owner of the mill, when, by incurring a little more expense, they might accomplish their object without damage to any one?

The Lord Chancellor was of opinion that, in such a case, the court ought to interfere to protect the plaintiff; and he awarded an injunction, by which the company were restrained from making over the mill race any arch of less dimensions than the arch recommended by the engineer's report.[2]

Reg. Lib. 1829. A. 1827.

Greenwood v. Taylor.

Rolls.—1830; January 22.

A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in the suit for the administration of the assets of the deceased mortgagor: held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate.

In this suit which was instituted for the administration of the estate of the deceased mortgagor the mortgagee presented a petition praying that he might be permitted to prove in the cause for the full amount of the mortgage debt,

[1] Vide *Sheriff* v. *Coates*, ante, 159, 167.

[2] Vide *Blakenure* v. *The Glamorganshire Canal Navigation*, 1 Myl. & K. 154.

and that the mortgaged estate, which was alleged to be insufficient to pay the debt, might be sold, and the produce paid to him, and that to the extent of the deficiency he might receive payment from the proof in the cause *pari passu* with the other specialty creditors.

*Mr. *Swanston*, for the petition:—The mortgagee has a right to [*186] avail himself, concurrently, of all the remedies which belong to him, either in respect of his specific lien on the estate, or as a general creditor of the mortgagor by virtue of the covenant for the payment of the mortgage money. In availing himself of the benefit of the covenant, he is not bound to relinquish any part of the benefit arising from his real security. The petitioner, in this case, is unquestionably a specialty creditor of the testator: what is there to prevent him from proving under the decree the whole amount of his demand, in the same manner as he might have sued the testator, if alive, and taken out execution against him for the whole amount? If his mortgage is satisfied by what he receives under the decree, the representatives of the mortgagor will be entitled to have the estate reconveyed: if it is not satisfied, the petitioner will still be mortgagee *pro tanto*, and if none of the parties interested think it worth while to redeem, he would have a right to foreclose. But he does not insist on that strict right: he is willing that the estate should be sold, and he offers that it should be treated, subject to his lien, as a part of the general assets of the testator.

It is true that, in bankruptcy, the mortgagee does not prove till after the mortgaged estate has been sold, and that his proof is only for the deficiency. But that rule depends on principles peculiar to the jurisdiction in bankruptcy. The great object in bankruptcy has uniformly been to place all who seek the benefit of the commission on a footing of equality: and in furtherance of that object, though the creditor, who has a security, need not come in under the commission, yet, if he wishes to prove his whole demand, he must relinquish *his security for the general benefit of the creditors. That [*187] rule never has been and cannot be extended beyond bankruptcy; if it were applied to the present case, it might in like manner be contended, that, because under a commission specialty creditors and simple contract creditors share alike, they ought, therefore, to be placed on the same footing, whenever assets are administered in this court.

Mr. *Tinney* and Mr. *Stuart*, contra.

The Master of the Rolls:—The rule in bankruptcy must be applied here; and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets. The mortgagee, who has two funds, as against the other specialty creditors, who have but one fund, must resort first to the mort-

gage security, and can claim against the common fund only what the mortgaged estate is deficient to pay.(a)[1]

[*188] *LYNN v. ASHTON.

ROLLS.—1830; January 28.

A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death, to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly.

By a settlement dated in 1797, and made in contemplation of the marriage of Mr. and Mrs. Lynn, a fund, amounting to about 1400*l.* three per cent. consols, was vested in trustees on trust, after the marriage, to pay the dividends to Mrs. Lynn for her separate use during her life, and after her death, to transfer the fund to such person or persons as she should by any deed or writing appoint; with limitations over, in default of appointment, to her children, and if there were no children, to her next of kin. In 1827, she, by a deed to which her husband was a party, assigned her life interest to two trustees, and by the same instrument appointed the capital of the fund after her death to the same trustees, upon trust that they should immediately, with all convenient speed, apply 1200*l.* stock, part of the fund, in the purchase of an annuity for the lives of her and her husband, and the life of the survivor, and that they should stand possessed of the residue of the stock upon the trusts therein mentioned.

One of the trustees, in whose name the fund stood, declined to transfer the stock to the new trustees without the direction of a court of equity; and the present bill was filed to compel him to concur in such a transfer.

Mr. *Pemberton* and Mr. *Purvis*, for the plaintiffs:—As this lady's life in-

(a) See *Tooke* v. *Hartley*, 2 Dick. 785. S. C. 2 B. C. C. 125. *Aylet* v. *Hill*, 2 Dick. 551. *Wiseman* v. *Carbonell*, 1 E. Ab. 312. As to the practice in bankruptcy, *Ex parte Smith*, 2 Rose, 63, and the cases there cited.

[1] The above decision was overruled by Lord Cottenham, in *Mason* v. *Bogg*, 2 Myl. & Cr. 443, 448. In *Tipping* v. *Power*, 1 Hare, 405, 410, Wigram V. C. observed: "In *Greenwood* v. *Taylor*, Sir J. Leach said, that if after the death of the mortgagor, a creditor comes to have his debt paid, his remedy is to sell his security, and after application of the proceeds, to come for the difference against the estate. Lord Cottenham in *Mason* v. *Bogg* disapproved of that decision, and said that a mortgagee had a right to make the most he could of all his securities. It is laid down in Cruise's Digest, and other text books, that where a legal mortgagee has a bond or a covenant, the court will sell the mortgage, and allow the party to prove for the difference. This was the opinion of the Vice Chancellor in *Brocklehurst* v. *Jessup*, (7 Sim. 438;) and the Master of the Rolls in *Allen* v. *Martin*, (February, 1841) said, that the mortgagee by consenting to a sale could not be taken to have waived his right to have his debt paid out of the general assets." As to the general rule by which a creditor, holding an exclusive lien, is thrown upon *that* in the first instance; see 2 Russ. 299, n. 1; 2 Myl. & Cr. 450, n. 1. *Averall* v. *Wade*, Lloyd & G. 255, 268. *Wiggin* v. *Dorr*, 3 Sumn. 414. *York & Jersey Steamboat &c. Company* v. *The Associates of the Jersey Company*, Hopk. 460.

terest is settled to her separate use, she is, with respect to it, a feme sole, and has a disposing power over it: therefore, that life interest is well vested in the trustees to whom it has been assigned; *Sturgis* v. *Corp.*(a) [*189] The same trustees, by virtue of the appointment, take the capital of the fund after her death. Thus, they have the whole interest, present and future; and must, therefore, be entitled to a transfer of the stock.

Mr. *James*, for the trustees in whom the fund was vested. These defendants are called upon to annihilate the trusts on which they hold this money. Their trust is, to pay the dividends to the lady during her life, and after her death, to hand it over to her appointees; or, if she make no appointment, to those persons for whom, in default of appointment, a trust is declared. It is of the very essence of the trust, that they should retain the capital till her death; and now they are required to part with it during her life. The court will not interfere to enable parties to deal with a fund in a manner contrary to the intention of the instrument under which their interests are created. *Goldsmid* v. *Goldsmid.*(b) Her appointees do not take till after her death. She has no power to give them a right to the possession of the capital at an earlier period; and they are not entitled to have it transferred to them now. When this lady dies, it will be ascertained who the persons are who would be entitled in default of appointment; and those persons may then contest the validity of that instrument, by which it is alleged the capital of the fund has been disposed of.

Mr. *Pemberton*, in reply. It has always been considered by conveyancers, that a perfect title to a fund could be made in the way adopted [*190] here. The defendants can never be trustees for any person, except the persons named in the deed of assignment and appointment which the lady has executed. This court has frequently given effect to instruments by which a wife has assigned to her husband property settled to her separate use; yet nothing could be more opposed to the purview of such settlements, than that the wife's interest should become the husband's.

The Master of the Rolls, after some hesitation, made the order; considering that, by the union of the life estate with the remainder, there was no *scintilla* of interest left in any other person.[1]

(a) 13 Ves. 190. (b) 1 Turner & Russel, 445.

[1] Vide *Jackson* v. *Noble*, 2 Keen 590. *Wood* v. *Burnham*, 6 Paige, 513, 517.

[*191] *PRITCHARD *v.* DRAPER.

ROLLS.—1830; January 28. L. C.—1831; July 1, 5.

Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner.

One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership and retained out of them the amount of the debt; and he stated, that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the debtor; held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer, that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill: *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured:

But held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions.

THE plaintiff Pritchard and the defendant Draper, being in partnership as solicitors and attorneys, were employed by Sir Thomas M. Wilson in that capacity, and also as receivers of the rents of his estates. The partnership was dissolved in October, 1817. From that time until September, 1820, Draper was the solicitor of Sir Thomas Wilson, and the receiver of his rents; and of that fact Pritchard was well aware. In July, 1818, Draper transmitted to Sir Thomas Wilson a bill of costs due from him to the partnership; and the balance against Wilson on that bill, after giving him credit for various payments, amounted to 442*l.* On the 17th of February, 1821, Pritchard gave notice to Sir Thomas Wilson not to pay Draper the balance of the bills due to the late partnership. On the 22d of the same month Draper entered into a written agreement with Pritchard, by which, after reciting that 750*l.* was due to Pritchard in respect of the partnership transactions, he, Draper, engaged to secure the payment of that sum by his bond, and by an assignment of all the outstanding partnership debts; and, immediately afterwards, notice of this agreement was served on Sir Thomas Wilson.

The suit was instituted in May, 1821, by Pritchard against Draper
[*192] and Sir Thomas Wilson, for the purpose *of having an account taken of what was due from Sir Thomas M. Wilson to the partnership. The bill stated, that the defendants alleged that, after the dissolution Sir Thomas M. Wilson paid to Draper the debt due to the partnership; and it charged that, if any payment took place, it was made after Sir Thomas M. Wilson had notice of Draper's agreement to assign the outstanding debts to Pritchard.

Sir Thomas Wilson died before he had put in an answer. The suit was revived against his executors; and they, by their answer, stated, that no

bill of costs, signed conformably to the act of parliament,(*a*) had been delivered to them or to Sir Thomas Wilson. The plaintiff then filed a bill of supplement, in which he alleged that, subsequently to the institution of the suit, namely, on the 27th of May, 1823, he delivered to one of the executors a bill of costs, signed in conformity to the requisitions of the act of parliament.

At the original hearing, a decree was made, referring it to the master to tax Pritchard and Draper's bill of costs, and to take an account of what, if any thing, was due from the estate of Thomas M. Wilson in respect of such bill; with liberty to state special circumstances.

In the proceedings before the master, interrogatories for the examination of Draper were exhibited both by the plaintiff and by the executors of Sir Thomas M. Wilson. Draper, in his answer to the plaintiff's interrogatories, stated that he did not, after the dissolution of the partnership, settle any account with Sir Thomas M. Wilson; that Sir Thomas M. Wilson had not debited him with, or in writing allowed him, any sum expressly on account of costs; and that no account had been adjusted or agreed upon between them, in which credit *was given to the examinant [*193] for any sum as paid to or retained by him on account of costs. In answer to the interrogatories exhibited by the executors of Sir Thomas M. Wilson, he stated, that Sir Thomas M. Wilson had desired him, when he had moneys in his hands, to retain what he wanted; that he accordingly from time to time retained various sums with the permission or by the direction of Sir Thomas M. Wilson: that by these means the examinant received the whole amount of the bill of costs due to the partnership at the dissolution; that the full balance of the bill was paid in September, 1820, when he retained a sum of 282*l.*; and that it was understood by him, and, as he believed, by Sir Thomas M. Wilson, that credit should be given to the examinant in his account with Sir Thomas M. Wilson for the sums so paid and retained by him, when the accounts should, at a future time, be settled between them.

The circumstances, as stated above, were bound by the report; but the master was of opinion that the balance of 442*l.* was still due from Wilson's estate. And the question, on further directions, was, whether the debt, which was due from Wilson to the partnership at the time of the dissolution, was satisfied by the sums subsequently received and retained by Draper.

Mr. *Treslove* and Mr. *O. Anderson*, for the plaintiff:—The facts, which are specially stated in the report, afford no ground for disturbing the conclusion to which the master has come. It is not denied that Draper was indebted to Sir Thomas M. Wilson; but the debt due to him from one of partners cannot be set off against the debt due from him to the partnership. Draper's examination ought not to be referred to. He was

(*a*) 2 G. 2, c. 23, s. 23.

[*194] *examined as a party in the cause. The plaintiff does not need to have recourse to any part of either of the examinations in order to support his case; and the defendant cannot read them to disprove that case. Even if Draper's statements be admitted, they do not show that the debt due to the partnership was in any way satisfied. All that appears is, that he had moneys in his hands as receiver to Sir Thomas M. Wilson; and he now chooses to say, that these moneys were retained by him in satisfaction of the partnership debt. It is clear that nothing passed at the time, which, if Sir Thomas M. Wilson had brought an action against him for the balance in his hands as receiver, would have enabled him to set off the debt due to the partnership against that demand. *Jeffs* v. *Wood*,(*a*) *Heath* v. *Percival*.(*b*)

Mr. *Pemberton* and Mr. *Cooper*, contra:—The master has set forth in his report the substance of Draper's examination; and it is an extraordinary position to say, that the court is not to look at what the master has so stated; particularly when it is considered that one of the examinations is in answer to interrogatories exhibited by the plaintiff. From these examinations it appears that Draper, out of the moneys which came into his hands as receiver, retained the amount of the bill of costs in or prior to September, 1820, and that he did so with the permission of Sir Thomas M. Wilson, and on the understanding of both parties, that Sir Thomas M. Wilson was to have credit for that sum on the final settlement of accounts. Retainer, under such circumstances, is the same thing with payment; and as the claim of the partnership would have been extinguished by a payment in 1820 to Draper, it must be equally satisfied by his retainer of the amount. It is quite

[*195] *immaterial that no formal settlement of accounts took place, in which Sir Thomas Wilson was debited with the sum so retained, or that there was not an express sanction of the act of Draper on each occasion on which any sum was retained. The substance of the transaction was, that, by the agreement and understanding of both parties, Draper was entitled to retain the amount of the bill of costs out of the moneys in his hands; and the only question that remains is, did he so retain it?

The Master of the Rolls:—Had the case made by the bill been consistent with the facts as they appear in the report, the master's finding would have been consistent with the law. But the case made by the bill is totally different from the case stated in the report. The bill alleges that the partnership debt, if paid at all, was paid by Sir Thomas Wilson, after he had notice of the assignment by Draper to Pritchard of all the outstanding partnership debts; whereas it turns out that the payment, on which the defendants insist, was prior to the assignment, and consequently prior to any notice of the assignment. It is clear that payment, after dissolution, by a debtor of a partnership to any one partner, is a good payment, unless there be notice that the debts are to be paid to some other person. If the debtor, instead of pay-

(*a*) 2 P. Wms. 129. (*b*) 1 P. Wms. 683.

ing what he owes, gives one of the partners authority to receive moneys on his account, in the confidence that they will be applied in satisfaction of his debt, retainer of these moneys by the partner receiving them is equivalent to payment. In the present case it must be intended, that Sir Thomas Wilson gave Draper authority to retain moneys due to him, in the confidence that these moneys were to be applied in payment of the debt due to the partnership.

*The bill must be dismissed, with costs up to the original hear- [*196]
ing.[1]

From that decree the plaintiff now appealed.

1831; *July* 1.—Sir *Edward Sugden*, Mr. *Treslove*, and Mr. O. *Anderson* for the appellant, contended that Lord Gifford, by the decree which he had made at the Rolls directing inquiries and accounts, sufficiently declared his opinion that this was a proper case for a suit in equity. From the situation in which the parties stood with relation to each other, it was impossible for Sir Thomas M. Wilson to set off costs due from him to the firm against sums received for him by Draper in his individual capacity as a receiver of the rents of his estates, or for the latter, without the express authority of his partner, to apply the sums so received in discharge of a debt due to the partnership. *Todd* v. *Reid*,(*a*) *Russell* v. *Bangley*.(*b*) The admissions of Draper, in an examination taken long after the partnership was dissolved, and touching matters which had happened subsequently to the dissolution, could not be evidence to affect the rights of his former partner. In *Wood* v. *Braddick*(*c*) C. J. *Mansfield* lays it down as clear law, that "the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation." If, however, the evidence of Draper were to be admitted, it would be found, when closely examined, not to establish the fact, that any authority (allowing that to be sufficient) was ever given by Wilson to appropriate his moneys in Draper's hands to the satisfaction of the joint debt which he owed to the firm; or that Draper, *in conse- [*197]
quence of such authority, ever made any express appropriation to that specific object.

The Solicitor General(*d*) and Mr. *Cooper*, in support of the decree, insisted that the suit ought to have been dismissed at the original hearing. No bill of costs had been delivered a month before the filing of the bill, as was required by the 2 G. 2, c.23, s. 23,(*e*) although that satute clearly applied to suits in equity as well as to actions at law: and the supplemental bill, before the filing of which a bill of costs was regularly delivered, and which was intended to put that fact in issue, could not remedy the defect. The

(*a*) 4 B. & A. 210. (*b*) 4 B. & A. 395. (*c*) 1 Taunt. 104.
(*d*) Sir W. Horne. (*e*) Made perpetual by 30 G. 2, c. 19, s. 75.

[1] For another report of the case before the M. R., see Taml. 332.

evidence of the defendant Draper, touching matters that occurred after the separation, but having a direct reference to partnership transactions, was clearly admissible; and whatever the chief justice might have thrown out incidentally in *Wood* v. *Braddick*, the decision in that case, so far from being an authority for rejecting the evidence, was rather the reverse. If, however the law had been otherwise, it was not competent for the party, at whose instance the examination had been taken, to turn round now and endeavor to get rid of it. Upon the result of that examination, it was fully made out that draper was sufficiently authorized to make the application of the sums in his discharge of the partnership demand.

July 5.—THE LORD CHANCELLOR(*a*) :—The debt which the suit seeks to recover, was a taxable bill of costs; and if an action at law had [*198] been *brought, it could not have been maintained on the evidence which was before Lord Gifford, when he made the original decree; for the 2 G. 2, requires that a signed bill should be delivered one month before the action brought, and in the present case no such bill had been delivered. Suits in equity are subject to this provision of the statute as well as actions at law; and the word "solicitor in chancery" are expressly inserted in the act.

The supplemental bill, which was subsequently filed for the purpose of remedying that defect, and of introducing the statement that a bill of costs duly signed had been delivered after the institution of the suit, could not have cured this objection; and if the decree of Lord Gifford had been appealed from, it could not have stood; the original bill must have been dismissed. But that judgment not having been appealed from, I think, on the whole, it is now too late to take the objection.[1]

The question in the cause is, whether or not Sir Thomas Wilson has paid the bill of costs which was due to the firm of Pritchard & Draper; and that turns upon this,—whether the payment is proved or not by Draper's examination. Draper was a partner at the time when the liability was incurred: the contract, out of which it arose, was made by Sir Thomas Wilson with Draper and Pritchard jointly, and they were jointly employed by him. Draper is examined, after the partnership had ceased, as to a fact relating to the partnership transactions, or connected with them, but which fact took place after the dissolution of the partnership. The case then, stands thus: is this deposition of Draper, who was once a partner with Pritchard, but at the time of the deposition, had ceased to be such partner, evidence, [*199] not only with respect to what took *place during the partnership in connection with partnership transactions, but with respect to what took place relating to a partnership transaction subsequently to the cessation of the partnership?

(*a*) Lord Brougham.

[1] Vide *Fernes* v. *Hutchinson*, ante, 22, 24 and note ibid.

Suppose the question arose in an action at law, and that another witness had proved that Draper, after he had ceased to be a partner, had made an admission touching something relative to a partnership transaction, which something took place subsequently to the termination of the partnership: that, I am of opinion, would have been evidence. If, before Lord Tenterden's act, two persons made a joint promissory note, and six years ran before an action was brought, an acknowledgment of liability by one of those persons was sufficient to take the case out of the statute of limitations, although made respecting a fact which took place long after the connection of the parties, as makers of the note, had ceased. That was decided by the king's bench in *Whitcomb* v. *Whiting*,(*a*) and the same doctrine was held in the common pleas. In such circumstances, a declaration made by one partner only was sufficient to bind the other, and to support the action against both; and upon this specific ground,—that, in respect of the promissory note on which, in *Whiting* v. *Whitcomb*, the question arose, the liability was joint; and what one person, jointly liable, says respecting the subject matter of a joint contract, is evidence to affect all his co-contractors. So firmly settled was the law on this point, that to alter it, an express clause has been inserted in Lord Tenterden's act.

Now, wherein does such a case as that which I have mentioned differ from the present? This was a partnership transaction—a joint claim arising out of a joint employment. The partnership, it is true, had [*200] ceased; but so, in *Whitcomb* v. *Whiting*, had the connection between the two makers of the promissory note. *Wood* v. *Braddick*,(*b*) as far as it goes, is in favor of the same doctrine. There the letter of one Cox, written after the cessation of the partnership between him and the defendant, and stating a balance to be then due from them, was held to be admissible. That was a declaration relating to something connected with partnership transactions, but which something happened after the cesser of the partnership.

Upon the whole, I am clearly of opinion that the declaration of Draper would have been evidence; and *a fortiori*, that his formal examination in the cause is evidence to affect Pritchard's right in a partnership affair, although touching matters which have occurred since the dissolution of the partnership, namely, the subsequent payment of a partnership demand. I have consulted one of the chief justices on the point; and I have great satisfaction in finding, that he entertains no doubt as to the admissibility of such evidence.[1]

The question then resolves itself into this, whether Draper's evidence proves the payment of the bill of costs by Sir Thomas M. Wilson. If I

(*a*) Douglas, 652. (*b*) 1 Taunt. 104

[1] The general dissolution of a partnership does not necessarily put an end to the partnership in respect of past transactions: so, where one of the partners, after dissolution, devises his estate, in trust, for the payment of debts, the operation of the statute of limitations is prevented. *Ault* v. *Goodrich*, 4 Russ. 430.

could view the facts of the case in the same light, in which they appear to have presented themselves to the Master of the Rolls, I should not hesitate to affirm the judgment. But the question of fact is, whether or not Draper, being in the receipt of Wilson's money as his receiver, apart from the firm of Draper & Pritchard the solicitors, was directed by Sir Thomas M. Wilson to apply his, Sir Thomas M. Wilson's, money, which he so received [*201] apart from the partnership, *to the payment of the partnership debt; and it is for Sir Thomas Wilson's executors to prove that Draper had such authority.

Now, it appears to me, that, taking the whole of Draper's examination together, there is no evidence that Sir Thomas Wilson, did authorize Draper to apply the money received by him to the payment of the debt due to the partnership; and, on the contrary, that there is evidence that no such authority was given. It is true that Draper, when he speaks in general terms, gives, as witnesses very often do, an inaccurate representation of what occurred: he states his opinion or impression as to a result; but when he comes to particulars, the inaccuracy is corrected. He says that he had authority to pay the partnership debt: but when he descends into particulars, what he sets forth as an authority amounts to no authority at all; so that it is quite clear that his general assertion must go for nothing. He says, that the debt was paid: but let us see what he calls payment:—"And this examinant saith, that the said bill was paid, or this examinant received the amount thereof, at various times and by various sums of money; some of which sums were paid to this examinant by the direction of Sir Thomas M. Wilson, and others of them by moneys retained by this examinant by the direction and with the permission of the said Sir Thomas M. Wilson, out of moneys belonging to him, which had been received by this examinant." If the evidence had stopped here, I should have said this was evidence of an authority to apply or appropriate to payment of the debt in question, the money of Sir Thomas Wilson which he, Draper, either then had or was to have had in his hands. But the examination proceeds:—"And this examinant does not recollect or believe that such moneys, or any part of them, were retained by him expressly on ac- [*202] count *of such bill of costs." Unless he retained them expressly on that account, there was no payment. The operation of payment was to be effected under Sir T. Wilson's authority, and it could be effected only by retainer expressly on account of the debt. Again—"for when this examinant had moneys of the said Sir T. M. Wilson in his hands, the said Sir T. M. Wilson told him to retain what he wanted, as money would be of no use to him, this examinant." This might be as an accommodation or convenience to Draper personally. Draper adds, that "he accordingly retained the moneys mentioned in the schedule to the report; that to the best of his belief there was not any money due from the estate of Sir Thomas M. Wilson to the partnership." That, however, is merely, his opinion as to the result, which is a matter rather of law than of fact.

Taking the whole of the examination together, I think it is clear that there was not any direct authority from Wilson to apply or appropriate his moneys in Draper's hands to the payment of the joint debt due to Pritchard and Draper; and that in fact there was not any express appropriation by Draper of those moneys to that purpose. The decree, therefore, must be reversed.

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*Vawdry v. Geddes.[1] [*203]

Rolls.—1830; January 27; February 4.

A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age, Held:

That the children of the sisters were not to take a vested interest, till they attained twenty-two, and:

That all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote.

The testatrix, Amy Seamen, after giving some legacies, and directing by her will the sale of certain property in manner therein mentioned, proceeded in the words following:—"And I do direct that the money to be paid for the same, and all the produce of the residue of my estate and effects, after paying the before mentioned legacies and funeral expenses, and any debts which I may owe, shall be placed out upon mortgage or government security, and the interest, dividends, or produce thereof, shall be equally divided between my four sisters, for their sole and separate use, and independant of the control or authority of their husbands, during their natural lives; and on the death of my sisters, I will and direct that the interest of their respective shares shall, at the discretion of my executors, be applied in the maintenance and education or accumulate for the benefit of the children of each of my sisters so dying, until they shall severally attain the age of twenty-two years; and upon any of their attainment to that age, they shall be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age, leaving lawful issue, such issue shall be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the mean time; but in case any such children shall die under the said age without leaving issue, or such issue shall die before they are entitled to *the principal of their shares, that then the other children of my [*204] said sisters shall be entitled thereto, together with the issue of any of them who shall be then dead, in like manner, and with the like benefits of

[1] S. C. Taml. 361.

survivorship as their original shares: but in case all the children of any of my said sisters shall die without issue, or, there being such issue, they shall die before the principal of their respective shares shall become payable, then the share of such of my sisters, whose children shall so die, shall be paid and applied to and for the benefit of my other sisters, and their respective children or issue, in like manner as their original shares; and upon the decease of my sister Hannah Evans, leaving no issue, I will that my brother in law, William David Evans, shall have the interest and produce of her share during his natural life, and that, upon his decease, the same shall be applied to and for the benefit of my other sisters and their children, in like manner, and with like power of survivorship as the shares of my other sisters are."

The testatrix died in 1798.

Catherine Perrin, one of the four sisters mentioned in the will, died in February, 1803, leaving an only child, Sarah, born in the testatrix's lifetime: Sarah intermarried with William Geddes, and afterwards died in the lifetime of her husband, at the age of nineteen, leaving a son, the defendant Archibald Perrin Geddes who subsequently attained the age of twenty-two years. Elizabeth Nicholson, another of the four sisters of the testatrix, died in 1810, leaving the defendant Peter Nicholson, her only child, who was born in the testatrix's lifetime, and had long since attained his age of twenty-two years. The other two sisters of the testatrix were still living: one of them had never had any child: the other had several children, who were born, [*205] in the *lifetime of the testatrix, and all attained the age of twenty-two.

The bill was filed for the purpose of ascertaining the interests of the parties in the residue, and of having it declared by the court who were the persons now entitled to the shares of the two deceased sisters.

Mr. *Duckworth*, for the plaintiff.

Mr. *Bickersteth* and Mr. *Koe*, for some of the defendants:—All the limitations after the life estates are void. The bequest is to the sisters of the testatrix for their respective lives, with a gift in remainder to such of their children as shall attain twenty-two, and a limitation over in case of the death of any of them under that age. The gift in remainder is to class comprising persons not in *esse*, and whose interests are not to vest till they attain twenty-two: it is consequently too remote. *Leake* v. *Robinson*,(*a*) *Bull* v. *Pritchard*.(*b*)

Mr. *Pemberton* and Mr. *Simpkinson*, for the representatives of a grand child who died under twenty-two:—The gift to the children of the sisters gives each child, as it comes into existence, a vested interest, subject to the contingency of being devested in the event of such child dying under twenty-two years of age. At twenty-two, and not before, the trustees are to pay over the fund to the legatees; but the interest is to be applied in the

(*a*) 2 Mer. 363. (*b*) 1 Russ. 213.

maintenance and education of the children, or to accumulate for their benefit, until they respectively attain twenty-two. Upon the death of any of the sisters, the whole interest of her share is given to her children; it *must either be applied to their maintenance and education, or accu- [*206] mulated for their benefit: and the rule is, that, if the whole of the interest of a legacy is to be applied for the benefit of the legatee, the legacy vests as soon as the right to interest commences, though the bequest is, in form, a gift to the legatee, only upon the happening of some future contingency. *Booth* v. *Booth*;(a) *Hanson* v. *Graham*.(b) In *Murray* v. *Addenbrooke*(c) a residue was given, after the death of the testator's widow, to the eldest surviving son of Sir John Murray, upon his attaining twenty-five; and the trustees were directed to apply the interest to his use, till he attained that age; the Lord Chancellor held, that the eldest son of Sir John Murray, living at the death of the widow, would take a vested interest in the residue though he should not have then attained the age of twenty-five. Upon the principle of that case, the children of each sister must be held to have taken upon her death, a vested interest in their respective shares of the residue.

The testatrix then goes on to provide, that the interest given to the children of the sisters respectively shall be devested, if they die under twenty-two, and, upon that event, to limit the fund over to other persons. This proviso and this limitation over are clearly too remote. The consequence is, that the interest, which the children take under the preceding clause, remains absolute.

Mr. *Temple*, for a grand child who had attained twenty-two:—The bequest may fairly be confined to such children of the sisters as were in *esse* at the death of the testatrix. *Blanford* v. *Thackerell*.(d) Even if the gift of the *principal had been too remote, the interest is directed [*207] to accumulate for their benefit; and though the accumulation for twenty-two years would be void, yet it might be good for twenty-one years under the 39 & 40 G. 3, c. 98, or by analogy to the construction of that statute. *Longdon* v. *Simson*.(e)

The Master of the Rolls:—I am not able to distinguish this case from the residuary gift in *Leake* v. *Robinson*.(g) There, as here, it was the gift of the residue; there, as here, the trustees were at their discretion to apply the rents, interest, and dividends to the maintenance and education of the children, until they attained the prescribed age; and there, as here, if any of the children died before that age, their shares were to go over to the surviving children. In that case, the shares of the children were not only to take effect upon their attaining the prescribed age, but also upon marriage, which is not

(a) 4 Ves. 399. (b) 6 Ves. 239. (c) 4 Russ. 407.
(d) 2 Ves. jun. 238. (e) 12 Ves. 295. (g) 2 Mer. 363.

the case here; but that, in principle, can make no difference. In that case Sir William Grant proceeds upon this principle,—that the prescribed time cannot be considered as marking only a time of postponed payment, because there is no antecedent gift—no gift but in the direction to pay at the particular period.

It was argued, that the children took vested interests, because the trustees had a discretion either to apply the income in the maintenance or education or to accumulate it for the benefit of the children; and that this is, in effect, a gift of the whole interest until the prescribed age, subject, however, to be devested. But, if the whole interest had been expressly given to
[*208] *the children until they attained twenty-two, I do not agree that the shares of the children would therefore have vested, subject to be devested. The case of *Batsford* v. *Kebbell*, which is referred to by Sir William Grant in *Leake* v. *Robinson*, is an authority directly in point against that proposition. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property,[1] but that presumption fails entirely, when the testator has expressly declared, that the legacy is to go over, in case of the death of the legatee before a particular period. I speak here of gifts of personal estate, and not of real estate.

The language of this will gives an equal interest to all children of the sisters, whether born before or after the death of the testatrix.

The statute of accumulation was passed subsequently to the death of the testatrix, and can have no effect upon this will.[2]

My opinion, therefore, is, that the gifts over to the children of the sisters, whether born before or after the death of the testatrix, not being to take effect until the age of twenty-two, are too remote and void.[3]

[1] When a gift of the interest is a gift of the fund, see further 2 Keen, 57, note. Id. 621, note, Am. Ed. Et vide *Mills* v. *Roberts*, post, 555. *Saunders* v. *Vautier*, Cr. & Ph. 248. *Lister* v. *Bradley*, 1 Hare, 10, and the next, but one, subsequent note.

[2] As to retrospective statutes, see 3 Russ. 422, n. b. Am. Ed. *Varick* v. *Briggs*, 6 Paige, 323, 332. *Holmes* v. *Holmes*, post, 660, 663, n. a. *Sayre* v. *Wisner*, 8 Wend. 661.

[3] A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving issue, is not void as too remote, but gives a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue. *Bland* v. *Wiliams*, 3 Myl. & K. 411. A testator by his will bequeathed to his executors and trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to V. his executors, administrators or assigns absolutely. The will contained also a residuary bequest. The testator had 2000*l.* East India stock standing in his name at his death. It was held that V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and accordingly the court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one; and Lord Cottenham said: "There is not

*Arnold v. Congreve.[1] [*209]

1830; February 4.

A testatrix having a son and two daughters, gave 6000*l.* 3 per cent. stock to her son for life, remainder as to one moiety of it, to his eldest male child living at her decease; and as to the other moiety, to his other children; she also gave 6000*l.* like stock to her daughters for their respective lives, in equal shares, remainder to their children; and she further gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was, at his or her death, to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grand children's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children: Held,

That, by the operation of the codicil, the moiety of 6000*l.* 3 per cent. stock, which by the will, was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children;

That, as to all the other bequests, the attempt to extend the limitations to great grand children was ineffectual; and

That the absolute interests given by the will to the grand children were not destroyed or restricted by the codicil.

The will of Susannah Olivier, dated the 20th of September, 1792, contained, among other clauses, the following:—"I leave and bequeath 12,000*l.* 3 per cent. reduced annuities, which I have now transferred from the 4 per

[1] S. C. Taml. 347.

only the gift of the intermediate interest, indicative as Sir J. Leach observes in *Vawdry* v. *Geddes*, of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate: but a positive direction to separate the legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five. The decision in *Vawdry* v. *Geddes* and other cases, in which there were gifts over, cannot affect the present question." *Saunders* v. *Vautier*, Cr. & Ph. 240. In *Lister* v. *Bradley*, 1 Hare, 14, Wigram, V. C. says: "A legacy to be severed from a general estate *instanter*, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only upon the happening of a particular event. *This distinction was urged by myself* before Lord Cottenham, in the case of *Saunders* v. *Vautier*, and was approved by his judgment in that case. The language of Sir John Leach, in *Vawdry* v. *Geddes*, is to the same effect." Where there was a bequest of a testator's estate, to be equally divided between his children on attaining twenty-one, with a power of advancement "from their respective portions" of the testator's estate; and one of the children, who survived him, died under twenty-one, it was held that such child took a vested interest. *Vivian* v. *Mills*, 1 Beav. 315. But where there was a direction to executors to apply 25*l.* per annum for the maintenance of the testator's natural daughter, till twenty-one or marriage, which should first happen, when his executors were required to pay to her 500*l.*, and she died under twenty-one and unmarried; it was held that the legacy failed. "That the testator," said Lord Cottenham, "fixed upon the sum of 25*l.* per annum as interest at five per cent., upon 500*l.*, is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the 25*l.* per annum could not be affected by the interest upon 500*l.* not amounting to 25*l.*" *Watson* v. *Hayes*, 5 Myl. & Cr. 125. In *Ring* v. *Hardwicke*, 2 Beav. 352, 358. Lord Langdale, M. R. said: "The children on whose behalf this case has been argued, if they take anything, must take it under that clause [in the will] directing a division between all the children "who should live to attain the age of twenty-five years." It is admitted, that a gift expressed by those words is by itself too remote and void: but then it is said, there are other directions in the will which ought to qualify that construction: The directions are, first of all, upon the death or second marriage of the wife to invest, &c. the particular share previously given to a daughter, in the name of the trustees. Then it is said, that in the subsequent clause, which refers to a period when the children are under

cent. stocks; the same to be put in trust in the hands of my three executors, to be employed in the following manner:—One-half, or 6000*l.* of the said trust, the interest thereof shall be for the use of my son, the Rev. Daniel Stephen Olivier, during his life, and shall be duly paid unto him as his property; and, at his death, one-half, which will be 3000*l.* stock, shall revert to my son's eldest male child living at my demise, and the other half, or 3000*l.* stock 3 per cent. reduced, shall be divided in equal shares between his other children lawfully begotten; but, should my son die without leaving issue, in that case the whole of his moiety, or 6000*l.* 3 per cent. reduced stock, shall revert in equal shares between my other two children, during their lives, and, at their death, it shall revert to their issue; or, should either of them die without leaving issue, it shall, in that case, revert in equal parts to those of my grand children that shall then remain. The other moiety, or 6000*l.* [*210]. of the 12,000*l.* 3 per cent. reduced stock, in trust, shall be *divided in equal shares between my two daughters, namely, Julia Elizabeth Eyre and Margaret Esther Conybeare, the interest of which shall be duly paid them during their lives, and, at their death, each one's share shall revert to her children; but, should either of my daughters die without leaving issue, in that case their share of the trust, which will be 3000*l.* 3 per cent. reduced, shall revert in equal shares between my surviving children, and, at their death, to revert to my surviving grand children in equal shares."

Another clause was as follows:—"I also leave, and order to be put in trust by my executors, 10,000*l.* bank stock, which now stands in my name, the interest of which shall be duly paid in equal shares to each one of my three children, during their lives, and, at their death, each one's share or thirds of the 10,000*l.* bank stock, shall revert in equal shares between their issue; but, should either of my children die without leaving issue, in that case their share or thirds of the bank stock shall revert to the remainder of my children; and, at their death, to revert to their issue, or whatever issue shall remain from either of my children, in equal shares."

"All lapsed legacies," said the testatrix in a subsequent part of the will, "are to return to the bulk of my fortune, excepting those that are entailed, and the 700*l.* 3 per cent. consols, that I leave to Mrs. Passmer, which reverts to my son the Rev. Daniel Stephen Olivier, after her death, at his own disposal; neither shall any unentailed legacy return to the bulk that I leave to either of my children, in case they have any issue; and all the legacies that I leave to my grand children shall revert to their brothers and sisters, if they

twenty-five, that which was intended for the children is termed "the share" of the children, and that, therefore, the gift is vested, subject to be divested; but I consider this share means such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot therefore alter the effect of the previous gift." See further *Drake* v. *Pell*, 3 Edw. Ch. Rep. 251, 268. *Torrey* v. *Shaw*, id. 366. *Lister* v. *Bradley*, 1 Hare, 10. *Murray* v. *Tancred*, 10 Sim. 465. *Wood* v. *Cone*, 7 Paige, 478. *Birdsall* v. *Hewlett*, 1 Paige, 32. *Blease* v. *Burgh*, 2 Beav. 226.

die minors; or if such legacies are not entailed, and even should they die in *my lifetime, their share shall equally revert from the [*211] time this will is written."

The testatrix made a codicil, dated 30th March, 1800, which contained the following clause:—"I now furthermore request, that at the death of each one of my children, who have any issue, the 10,000*l.* bank stock, and also the 12,000*l.* 3 per cent. reduced, which by my will I have entailed upon my grand children, I would also have these, my grand children's share of the same two stocks, be also settled upon them to enjoy the interest thereof during their lives, and afterwards to revert to their children lawfully begotten: but, in default of any issue, they may dispose of it as they may think proper."

The testatrix died on the 7th of January, 1803, leaving Daniel Stephen Olivier, Margaret Esther Conybeare, and Julia Elizabeth Eyre, afterwards the wife of Sir William Congreve, Bart., her only children, her surviving.

Daniel Stephen Olivier had five children, of whom Daniel Josias was the eldest; and all of them were living at the death of the testatrix. Margaret Esther Conybeare had two children, both of whom were living at the death of the testatrix. Lady Congreve never had any children. All the grand children of the testatrix were in *esse* at the time of her death; and afterwards several of them had children.

The questions in the cause were,—what extent of interest the grand children of the testatrix took under the will and codicil,—and whether there was any valid gift to the issue of the grand children.

*Mr. *Bickersteth*, for the plaintiffs. [*212]

Mr. *Tinney* and Mr. *W. O. Carr*, for Daniel Josias Olivier:—

Daniel Josias, as the eldest male child of the testatrix's son, living at her decease, took under the will an absolute interest in the 3000*l.* 3 per cent. reduced annuities; and though the codicil affects to reduce the interests of grand children to life estates, the direction that *in default of issue*, they are to dispose of their shares as they may think proper, will give them a *quasi* estate tail. The court will the more readily adopt this construction, as the limitations to great grand children must be void, as being too remote. In this respect there can be no difference between the 3000*l.* and the rest of the property, or between Daniel Josias' children and the other great grand children; for though the 3000*l.* is limited to him by a particular description in the will, his children are not specially designated in the codicil: they could claim nothing under that instrument, except as individuals included in the class of children of the testatrix's grand children; but a gift to such a class is void, because it may include children of persons not in *esse* at the testatrix's death; and, therefore, no individual or individuals, claiming, not as being specifically described, but merely as being comprehended in the class, can take under such a gift. As to all the rest of the property, except the 3000*l.*, it is clear that there is no distinction between Daniel Josias or his children, and any of the other grand children or their children.

In support of these positions the following cases were cited: *Hodges* v. *Middleton*,(a) *Robinson* v. *Robinson*,(b) *Seale* v. *Barter*,(c) *Tothill* v. *Pitt*,(d) *Routledge* v. *Dorril*,(e) *Leake* v. *Robinson*,(g) *Sibey* v. *Perry*.(h)

*213] Mr. *Pemberton* and Mr. *Skirrow*, for other grand children of the testatrix:—It is evident that the testatrix, when she speaks of issue of her children, means merely their children, and that she does not include more remote descendants. Putting out of the question the interest of Daniel Josias in the 3000*l.* stock, the rest of the property is given, after the death of the testatrix's children, to her grand children as a class; and they take their respective shares absolutely. The codicil shows that the testatrix afterwards entertained the purpose of confining the grand children to a life interest, and of limiting over the principal to their children; but a limitation after the death of persons not in *esse* is too remote: and as the law will not permit the purpose expressed in the codicil to be carried into effect, that instrument ought not to be allowed to operate upon the interests created by the will. The codicil does not express any absolute intention to take away the interests which the will had given to the children: it merely intimates the wish of the testatrix that the property should be so settled as to go to the children of the grand children; and if there are no great grand children to take, the grand children are to retain full power of disposition. As the particular intention of the testatrix in favor of great grand children necessary fails, her general intention will be best carried into effect by leaving the rights of the parties in the same state as if the codicil had never been in existence.

[*214] *Mr. *Sidebottom*, Mr. *West*, Mr. *Teed*, and Mr. *Elderton*, for great grand children. There is not a single phrase in the will or codicil which shows that the testatrix had in contemplation grand children who might be born after her death; and, in fact, there never was any person answering the description of a grand child, who was not in *esse* during her life. When she speaks of her grand children, or the issue of her grand children, she must be considered as describing the term *grand children* a class of persons who were living at the time of her death; and this construction should be adopted the rather, as, in disposing of the first mentioned sum of 3000*l.* she gives it after her son's death, to his eldest male child living at her death. The consequence will be, that the limitations to the children of grand children, being expectant on the determination of the life interests of persons in *esse* at the death of the testatrix, will be valid.

Mr. *Treslove*, Mr. *Boteler*, Mr. *Roupell*, and Mr. *Lowndes*, for other defendants.

The Master of the Rolls stated, that, the 3000*l.* being given to the eldest male child of the testatrix's son living at her decease, a life interest

(a) Douglas, 431. (b) 1 Burr. 38. (c) 2 Bos. & Pul. 485. (d) 1 Madd. 488.
(e) 2 Ves. Jun. 357. (g) 2 Mer. 363. (h) 7 Ves. 522.

might be well limited to him, with remainder to his unborn children; that the will gave that sum absolutely to Daniel Josias as such eldest male child; but that the codicil ought to be read *reddendo singula singulis*; that the codicil, as applied to this bequest, amounted to a direction that Daniel Josias should enjoy the interest of the 3000*l.* during his life, and that the capital should, at his death, go to his children; and that these limitations of the 3000*l.* were within the rule of law.

His Honor further stated, that the other bequest to the grand children of the testatrix could not be confined *to grand children living at [*215] her death; that the words included every child whom her son or either of her daughters might at any time have; and, consequently, that, as to those bequests, limitations to the children of the grand children were void; that the testatrix, having, by the will, given her grand children absolute interests, had made a codicil expressing her desire that they should take only life estates, in order that their children might take in succession after their deaths; that her sole object in making the codicil, was to let in those children of grand children; that that purpose necessarily failed; and that, as the great grand children could not take, the intention of the testatrix would be best effectuated by holding that the absolute interests given to the grand children by the will were not destroyed by the codicil.[1]

The decree declared that Daniel Josias Olivier, as the eldest male child of Daniel Stephen Olivier, living at the time of the testatrix's decease, was entitled, during his life, and from the death of his father, to the dividends of the sum of 3000*l.* bank three per cent. reduced annuities in the will mentioned; that, as to the sum of 10,000*l.* bank stock, and all other the legacies and bequests to the testatrix's grand chidren in the will and codicils contained, except as to the said sum of 3000*l.* bank three per cent. reduced annuities, the limitations over to the issue of the testatrix's grand children contained in the codicil of the 30th of March, 1801, were void for remoteness; that, as to the sum of 10,000*l.* bank stock, Daniel Josias Olivier, as one of the grand children of the testatrix, and the issue of her son, Daniel Stephen Olivier, was absolutely entitled to a fifth of a third part of the sum of 10,000*l.* bank stock; that the four other children of Daniel Stephen Olivier became absolutely entitled to the sum of 3000*l.* bank three per cent. reduced *annuities, further part of 12,000*l.* like an- [*216] nuities, and to four-fifths of the one-third of the sum of 10,000*l.* bank stock in equal shares; that the children of Margaret Esther Conybeare were entitled to one-half part of the sum of 6000*l.* bank three per cent. reduced annuities, being the residue of the sum of 12,000*l.* like annuities, and to one other third part of the sum of 10,000*l.* bank stock, in equal

[1] As to the connected construction of a will and codicil, see *Cookson* v. *Hancock*, 2 Myl. & Cr. 606, 610. n. 1. S. C. 1 Keen, 817. *Shipperdson* v. *Tower*, 1 Yo. & Coll. C. C. 456. *Newman* v. *Lade*, id. 686. As to remoteness, see the preceding case.

shares; and that Lady Congreve was entitled, during her life, to the dividends of the remaining 3000*l.* bank three per cent. annuities, and of the remaining third part of the 10,000*l.* bank stock.

Banks *v.* Sladen.[1]

Rolls.—1830; February 18.

A testator gave a legacy of 12,500*l.* four per cent. annuities. At the making of his will there was a stock called new four per cents., in which he had a small sum, and a stock called four per cents. consolidated, of which he was a holder to a very large amount. Before the death of the testator, the latter stock was reduced to three and a half per cent.; and another four per cent. stock was created. The investment of the legacy is to be made in an existing four per cent. stock, and not in the stock which had been reduced to three and a half per cent.

Joseph Sladen, by his will, dated the 14th of October, 1822, bequeathed as follows:—"Also I give and bequeath unto my executors, George Ralph Payne, Jarvis Joseph Sladen, and John Baker Sladen, their executors and administrators, the sum of 12,500*l.* four per cent. bank annuities, upon trust, that they the said George Ralph Payne, Jarvis Joseph Sladen, and John Baker Sladen, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do, immediately after my decease, stand possessed of and interested in the said sum of 12,500*l.* four per cent. bank annuities, and shall and do invest the interest, dividends, and yearly proceeds of the same bank annuities, as the same shall from time to time become due, in accumulation of the capital thereof, in their own [*217] names, *and during the natural life of my said daughter Sarah, the wife of the said Lawrence Banks; and from and immediately after the decease of my said daughter Sarah Banks, upon trust that they, my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor shall and do pay, assign, or transfer the said sum of 12,500*l.* 4 per cent. bank annuities, together with all such accumulations as aforesaid, unto all and every the child and children of the body of my said daughter Sarah Banks already begotten and to be begotten, equally to be divided between them (if more than one) share and share alike; and if but one such child, then unto such only child; as and when he, she, and they shall severally and respectively attain his, her, and their age or ages of twenty-five years. And my will is, that the interest of the said bank annuities and funds of such child's part and share, who shall be under the said age of twenty-five years at the decease of my said daughter Sarah Banks, shall accumulate as aforesaid, until such child's part and share of and in the said trust moneys shall become payable, and shall be then paid unto such child according to the true intent and meaning of this my will. Provided,

[1] S. C. Taml. 407.

that, in case any of the children of my said daughter Sarah Banks shall die in her lifetime leaving issue, then such issue shall take its parent's part or share of the said bank annuities, funds, and moneys, and all accumulations thereof. But in case any of the children of my said daughter Sarah shall die in her lifetime without issue, then and in such case the part or share of such of them as shall so die, shall go and be paid to, and be equally divided between and among, the survivors of the children of my said daughter Sarah, if more than one; but if only one, then to such surviving child. And in case my said daughter Sarah shall happen to die without leaving any issue of her body lawfully begotten, or there being issue *all [*218] such issue shall happen to die in her lifetime, then I give and bequeath the said 12,500*l.* bank annuities, and all accumulations thereof, unto my said sons, Joseph Sladen, John Baker Sladen, and my said daughters, Caroline Matilda Smith and Mary Sladen, equally to be divided between them, share and share alike, and to their respective executors, administrators, or assigns accordingly."

The will contained, also, a similar bequest of 10,000*l.* 4 per cent. bank annuities upon like trusts for the testator's daughter Caroline Matilda, and her children.

The testator afterwards made two codicils, dated respectively on the 22d of October, 1822, and the 17th of November, 1823, which in no manner revoked or altered these bequests; and he died on the 27th of October, 1827.

The testator, at the date of his will, was possessed of 59,650*l.* four per cent. stock, called in the transfer papers "four per cent. annuities, consolidated in 1780." By the 5 G. 4, c. 11, which received the royal assent on the 23d of March, 1824, this stock was reduced to stock bearing only three and a half per cent. interest; and any proprietor of the former stock was entitled, on signifying his assent before the 6th of April, 1824, to receive, in lieu of his four per cents., an equal amount of the new three and a half per cent. stock. The testator assented under the act; the whole of his old four per cents. were converted into three and a half per cents. and, at the time of his death, the sum of 76,720*l.* 19*s.* 2*d.* three and a half per cent. stock was standing in his name.

At the date of his will, and time of his death, he was also possessed of the sum of 4725*l.* new four per cent. *annuities,(*a*) which had [*219] arisen, in July, 1822, from the conversion of 4500*l.* navy 5 per cents. under the 3 G. 4, c. 9.

The 7 G. 4, c. 39, which received the royal assent on the 5th of May, 1826, created a new four per cent. stock, which was irredeemable until after the 15th of April 1833.

The suit was instituted in 1829, for the purpose, among other things, of

(*a*) This stock was, by the 11 G. 4, c. 13, reduced to three and a half per cent. fund.

having a sufficient part of the testator's personal estate invested in the purchase of 12,000*l.* and 10,000*l.* four per cent. bank annuities in satisfaction of the two legacies.

The defendants, by their answer, stated, that there was not, at the date of the will, any stock called or known by the name of the four per cent. annuities, save that stock in which the testator held the sum of 59,650*l.* and which had since been reduced to a three and a half per cent. stock; and that there was not, at the then present time, any stock known or called by the name of the four per cent. bank annuities: for that the only stocks, which yielded a dividend of four per cent. were either the new four per cent. annuities, or the four per cent. annuities of 1826. Under these circumstances, they submitted, that the legacies would be well satisfied by a transfer of 12,500*l.* and 10,000*l.* three and a half per cent. annuities.

The question in the cause was, in what manner, and out of what stock these legacies were to be satisfied.

[*220] Mr. *Preston* and Mr. *Wharry*, for the plaintiffs:—These legacies are not specific bequests of portions of stock which, at the date of the will, were standing in the testator's name. They are merely general legacies, measured in quantity by certain amount of stock bearing four per cent. interest, instead of a certain number of pounds sterling. There existed at the death of the testator, and there still do exist, stocks of that denominaton, and bearing that rate of interest; and the executors are bound to purchase a sufficient amount of one or the other of these stocks to answer the bequests. The object of the testator was, that an income of a certain annual amount should accumulate during the lives of his daughters respectively, in order to create a fund which, at their deaths, might be a provision for their children.

The twentieth section(*a*) of the 5 G. 4, c. 11, providing that trusts, [*221] affecting the four per cent. bank annuities thereby converted, should be satisfied by an equal amount of the new three and a half per cents. does not apply to the present case; that clause has reference only to trusts which then existed, and to the wills of testators who were then dead. Here the testator lived some years after the passing of the act.

(*a*) That section enacts, "that all trusts, whether created by will or otherwise, and which existed either in the whole or in part, and all directions contained in any will or devise or testamentary paper which remain unexecuted at the time of the passing of this act, as to any four per cent. annuities which may under this act be converted into three and a half per cent. annuities, or as to the payment or distribution of any dividends thereon, or as to the transfer of any such annuities in any events specified in any such trusts or will or testamentary paper, shall extend and be deemed and construed in all cases and in all courts of law and equity in the united kingdom, or elsewhere in any dominions or territories belonging to his majesty, to extend and to apply to all such three and a half per cent. annuities, created in lieu of any four per cent. annuities, subject to or affected by any such trusts or devises or wills or testamentary papers, for all purposes, and in all cases in which such trusts or to which any such directions can be made applicable: Provided always, that in all cases in which any proportions or parts of any such four per cent. annuities are required to be transferred under any such trusts, or under the provisions of or directions contained in any will, devise, or testamentary paper, or any proportion or part of any dividends arising

Mr. *Bickersteth* and Mr. *Hayter*, contra :—The court will look at the state of the testator's property, as it was at the date of his will, in order to ascertain his intention. *Colpoys* v. *Colpoys*,(*a*) *Fonnereau* v. *Ponytz*,(*b*) *Jeacock* v. *Falkener*,(*c*) *Selwood* v. *Mildmay*,(*d*) *Crone* v. *Odell*,(*e*) *The Attorney General* v. *Scriven*,(*g*) *Doe dem. Jersey* v. *Smith*.(*h*) This testator, when he made these bequests, was possessed of a large sum of stock, which was accurately described by the words he used: those words could not at that time be descriptive of any other subject; and it is impossible to doubt that what he meant to give was a portion of that subject *which he had thus ac- [*222] curately described,—a portion of that stock which composed the principal part of his fortune. In consequence of an act of the legislature, that stock has been converted into a fund of a different denomination, and bearing a different rate of interest, so that the executors can no longer do the very thing which the will prescribes; but the obligation imposed on them will be best and most fully satisfied by giving to the legatees that stock which the legislature has substituted for the identical subject which the testator meant to give. It is true that an equivalent for the legacies might be found in the new four per cent. bank annuities; but the testator has not directed any such stock to be purchased: the new four per cent. bank annuities are not the stocks which he has given or meant to give. This will does not manifest any purpose of providing a yearly income for objects of the testator's bounty: his intention was simply to create two funds, which, at a distant time, were to be divided among the individuals who might then come within a given description.

THE MASTER OF THE ROLLS was of opinion, that, if the consolidated 4 per cent. annuities had remained at the death of the testator as they were at the making of the will, the executors might have satisfied the legacy by an investment either in the new four per cents. or in the consolidated four per cents.: that, the latter stock being gone, they were still at liberty to invest the legacy in the new four per cents.; and that the legatees were entitled to have the investment made in a stock bearing four per cent. interest.[1]

(*a*) Jac. 451. (*b*) 1 Bro. C. C. 472. (*c*) 1 Bro C. C. 295. (*d*) 3 Ves. 306.
(*e*) 1 Ball & Beattie, 449. (*g*) Decided by Lord Eldon but not reported. (*h*) 2 Brod. & Bing. 553.

from and out of such four per cent. annuities are required to be paid or distributed, the transfer of a like amount of three and a half per cent. annuities, and the payment and distribution of dividends at the rate of three and a half per cent. instead of four per cent., upon the capital, shall be and be deemed and taken, in all courts and for all purposes, to be a due execution of such trusts, or of the directions contained in any will or testamentary paper, and shall fully discharge the trustee or executor or executors making the same, who are hereby declared to be and are hereby fully indemnified in respect of such execution of any such trusts and executorship as aforesaid."

[1] In the report of this case in Taml. 407, 412, the Master of the Rolls, Sir John Leach, is represented to have said—giving a satisfactory reason for his decision :—" Had they [the bank annuities] remained in the same state, the executors would have provided for the legacies in the one fund or the other; for the only object the testator had was with respect to the income, and it would be indifferent to the intention of the testator whether the investment was in the one fund or the other. Now one of these funds, that of 1780, is since gone, it having been converted into three and

The decree was as follows :—" His honor doth declare that the in-
[*223] vestment of a sufficient part of the personal estate of Joseph *Sladen, the testator, in the purchase of 12,000*l.* four per cent. bank annuities, and 10,000*l.* four per cent. bank annuities, is to be made in the fund called the new four per cent. annuities."

Reg. Lib. 1829. A. 808.

Payne v. Low.

Rolls.—1830; February 5.

Dividends, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor, and the property of small amount.

Four infants, the children of a weaver, whose wages were about 24*s.* a week, were entitled to a yearly income of 14*l.* 5*s.*

A petition was presented, praying that the dividends might be paid to the father for their maintenance: and, on behalf of the petitioners, it was asked at the bar, that, in consideration of the smallness of the property and the poverty of the parties, the order might be made without a reference to the master.

The Master of the Rolls made the order without a reference.[1]

a half per cents.; but the destruction of that fund does not prevent the executors from making the investment in the remaining fund." A testator gave a legacy of 20,000*l.* in " the joint stock of the four per cent. bank annuities, transferrable at the bank of England, commonly called four per cent. bank annuities;"—the only four per cent. bank annuities existing at the date of his will were reduced to three and a half per cents.; afterwards, and before his death, a new stock of four per cent. bank annuities was created:—as the will speaks at the death of the testator, and the intention was plain to provide for the legatee an income of 800*l.* it was held that he was entitled to a sum of 2000*l.* in the then existing four per cent. bank annuities. *Sheffield* v. *The Earl of Coventry*, 2 Russ. & M. 317. As to the operation of statutes for the conversion of stocks, upon obligations and contracts, see ibid. *Milward* v. *Milward*, 3 Myl. & K. 311. As to change in the rate of currency, *Holmes* v. *Holmes*, post, 690.

[1] As to appointment of committee of lunatic, without reference, see ante, *Ex parte Farrow*, 112. Of guardian of infant; *Barry* v. *Barry*, 1 Moll. 213.

*Baker v. Bent.[1] [*224]

Rolls.—1830; February 8.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age and a bachelor, dying without issue, is not the subject of estimate or calculation.

But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly.

The bill was filed to set aside the sale by the plaintiff's wife and her former husband, of her reversionary interest in four undivided eleventh shares of a wharf and adjacent premises, which, at the time of the contract, were in the occupation of the defendant as tenant, and had ever since continued to be in his occupation. The relief was prayed on the ground, that the purchaser had not given the fair value for the property.

The reversion, which was the subject of the sale, was expectant on the death of James Roby, who was tenant for life, and on failure of his issue male, and was to be reduced to less than the four eleventh shares, in the event of his leaving issue female, or of there being issue of his sister Elizabeth Roby. In 1817, James Roby was unmarried, and had no issue, and was sixty-three years of age. His sister, also, who was only four years younger, had no issue, and was unmarried.

The female plaintiff was at that time the wife of a person who had been a writing clerk in a solicitor's office, but, in consequence of the loss of sight, had been for some time without any regular means of livelihood; and she and her family were in extreme distress. In March, 1817, a proposal on her behalf was made to the defendant, to purchase her reversionary interest; and he, after some correspondence, agreed to give 550*l.* for it. This treaty proceeded on the supposition that the reversion was not subject to any contingency, but was to take effect absolutely on the death of the tenant for life. In July, 1817, the abstract of title was delivered; and *the [*225] mistake as to the nature of the interest being discovered, the defendant stated, that, in consequence of the contingency to which the reversion was subject, he should give only one-half of the sum he had before offered. On the 2d of August the agreement was signed, fixing the price at 275*l.*; and it was shortly afterwards carried into effect.

Elizabeth Roby died in 1821; James Roby the tenant for life, died in 1822; and the reversion then fell into possession.

The present bill was not filed till 1828; but, in the intervening period, many applications had been made to the defendant to give up his purchase.

In 1817, the defendant occupied the entirety of the premises at a rent of

[1] S. C. Taml. 368.

220*l.* 16*s.*, which was at the rate of 80*l.* 6*s.* for four-elevenths. In the negotiation for the purchase, his solicitor, in a letter written by his request to the plaintiff's agent, stated the proportion of the rent paid for four-elevenths to be only 70*l.* But the bill did not charge that, in the treaty, there had been any misrepresentation of the rental. On the death of the tenant for life, in 1822, the defendant took a new lease of the other undivided shares of the premises, at a yearly rent which was at the rate of about 152*l.* for four-elevenths. But he alleged by his answer, that he was induced, by local and personal circumstances, to give for the shares not purchased by him a rent exceeding the actual value.

Several witnesses were examined as to the value of the reversionary interest in the premises, subject to the contingency; and all agreed in representing it as greatly more than the price which had been paid. Putting [*226] aside the contingency of issue of the tenant for life or *his sister, the reversion of the plaintiff's four-elevenths was estimated as worth, in 1817, about 2600*l.*

Mr. *Pemberton* and Mr. *Moore*, for the plaintiff:—It is the settled law of the court, that the purchase of a reversion cannot be sustained, unless the purchaser shows that he gave a full value for it. *Gowland* v. *De Faria*,(*a*) *Hincksman* v. *Smith*.(*b*) Here, not only has the purchaser failed to prove that he has given the full value, but the negative is clearly made out. In fact, for 275*l.*, paid partly in 1817, and partly in 1818, he acquired from 1822, the absolute fee of property worth upwards of 150*l.* a year. The mere statement of the transaction shows that it comes within the class of contracts which this court will not permit to stand.

Besides, it is clear that advantage was taken of the distressed situation of the vendors, and their want of accurate information concerning the value of the property. In the negotiation, the solicitor of the defendant represented to them that the rent paid for the share of the premises to which their interest extended was only 70*l.* a year; and the contract must have proceeded on their belief that his representation was true. In fact, the proportion of the rent for the four-elevenths was upwards of 80*l.* Thus, a reversion of 80*l.* a year, was sold under a notion, infused by the purchaser into the mind of the vendor, that it was a reversion of only 70*l.* Such a misrepresentation affords in itself a sufficient ground for setting the sale aside.

Mr. *Bickersteth* and Mr. *Beames*, for the defendant:—The bill does not allege that there was any misrepresentation by the defendant, or that [*227] the vendor was *ignorant of the actual amount of the rent: in fact, she had in her possesson a copy of an answer filed in 1814, by the tenant for life to a bill in chancery, in which the rent paid by Bent was accurately stated.

The ordinary principle cannot be applied to a case like this, because it is

(*a*) 17 Ves. 20. (*b*) 3 Russ. 433.

impossible to estimate the value of the contingency on which the reversion was expectant. The value of a reversion, to take effect on the death of a person of a given age, is a matter of calculation; but there is no arithmetic, which can estimate the probability, whether a certain individual will marry or not, and whether, if he marries, he will have issue. The court cannot set a value on such a contingency; and, therefore, it cannot interfere with the transaction, on the ground that the full value was not paid.

Mr. *Pemberton*, in reply:—There is no authority which says, that the general rule with respect to the sale of reversions does not apply to reversions expectant on failure of issue of this or that person. In an unreported case of *Whichcote* v. *Graham*, the sale of such a reversion was impeached, on the ground that the full value was not given for it. The master, to whom a reference on the subject of the value was directed, reported that it was worth a certain sum, which was very little, though somewhat, below the price actually paid. The court, deeming the difference too inconsiderable to bring the case within the rule, refused to set aside the transaction; and, on an appeal, the decree was affirmed by the present Lord Chancellor: but no person attempted to say that the doctrine of under value was not applicable to a dealing for a reversion expectant on a failure of issue.(*a*) There is, no doubt, *more [*228] difficulty in estimating the value of such reversions, than where the contingency is mere matter of arithmetical computation: but, still, they are bought and sold; their value is estimated *de facto*, and is, therefore, capable of estimate. In the present case the court has no occasion to perplex itself as to the value of the contingency, so far as that value depended on the possibility of the existence of such issue as would exclude the reversioner; for the plaintiff [defendant] has himself furnished the rule by which that contingency is to be estimated. When he considered the reversion to be a reversion certain, expectant on the death of James Roby, he was willing to give 550*l.*; when he discovered the contingency to which the interest was subject, he reduced his offer to one-half of that sum. We have, therefore, his admission, that the contingent reversion was worth one-half of what would have been its fair price, if it had been an absolute reversion, expectant on the death of James Roby. The value of the absolute reversion is a matter of strict calculation, and, consequently, the value of the contingent reversion, at least as against this defendant, may be ascertained accurately.

Besides, even if it were impossible to ascertain the value of a reversion dependant on a particular contingency, it might nevertheless be shown that it

(*a*) In *Henley* v. *Axe* (2 Bro. C. C. 17, and 2 Swans. 141, n.) the bill was filed to set aside the sale of a reversionary interest expectant on the decease of the plaintiffs' uncle without issue. On the application of the defendants, and with the consent of the plaintiffs, a reference as to the adequacy of the consideration was directed; the master reported in favor of the defendants; and, exceptions to the report being overruled, the bill was finally dismissed. See also *Ex parte Tindal in the Matter of Gibbins*, (Montagu and Macarthur, 415,) and *Ex parte Eagle in the Matter of Gibbins*, ibid. 422.

was sold, and must have been sold, for less than it was fairly worth. Admit that no computation can be made of the fair price of a reversion of
[*229] 80*l.* a year, expectant on the *death of James Roby and of his sister without issue, still it is certain that such a reversion must be worth more than a similar reversion of 70*l.* a year, and worth less than a similar reversion of 150*l.* a year. Now, the sale proceeded on the supposition that the rent of four elevenths of the premises was 70*l.* a year, when, in fact, it was 80*l.* a year. And even if the vendor had been aware that the rent paid under the existing lease was at the rate of 80*l.* a year, he would not have been treating on the basis of the fair value of the property; for, within five years from the date of the contract, the defendant took a lease of other undivided shares of the premises, at a rent which was nearly double of that rate. It is impossible, therefore, that a fair price could have been given for this reversion, because the treaty proceeded upon an estimate of the yearly value of the property which was far below the truth.

THE MASTER OF THE ROLLS:—The probability that a bachelor of sixty-three will marry and have issue, depending upon the peculiar habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation; and I put out of my consideration all evidence which affects to set a value on that contingency.

The plaintiffs have not in their bill alleged that there was any misrepresentation with respect to the rental. If it had been alleged, the defendant might have explained and disproved it. I cannot, therefore, infer misrepresentation merely from the expression used in the letter of the defendant's agent.

It appears that, on the death of the tenant for life in 1822, the de-
[*230] fendant agreed to pay the other proprietors *a rent for their shares at the rate of 150*l.* for four elevenths. He asserts that this was much more than the actual market value, and it may have been so; but it certainly affords a presumption, that, at the time of the contract, the premises were worth more than the existing rent of 220*l.*, and affords a strong ground for an inquiry, what was the value of the reversion of the female plaintiff at the time of the agreement? I mean the value of the reversion without regard to the contingency; for though, generally speaking, such a contingency, as I have already stated, is not the subject of estimate or calculation, yet, in this particular case, the defendant has himself furnished a rule by which to estimate that contingency. At the beginning of the treaty, the defendant was not aware that such a contingency existed, and he put a value upon the plaintiff's share, as if the reversion were certainly to take effect upon the death of the tenant for life. When he afterwards discovered the contingency, he proposed to deduct one half of the sum he had just offered; and that proposal was ultimately the basis of the agreement. He was well acquainted with the tenant for life, who was his landlord; and, his proposal admitting that, under all the circumstances, one half of the value of the reversion was a fair deduc-

tion in respect of the contingency, he cannot complain that the court adopts the rule which governed his own conduct in the treaty.

Upon the whole, therefore, I think the injustice of the case will be reached by referring it to the master to inquire and state what was the value of four elevenths of the reversion at the time of the agreement, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one-half of such value is to be deducted in respect of the contingency.[1]

*In this case, five years elapsed after the agreement, and before [*231] the death of the tenant for life, without issue, and no complaint was made on the part of the plaintiffs, who appear not to have disputed the contract, until the contingency happened in their favor. I give no costs, therefore, to the hearing; and shall reserve the consideration of further directions and subsequent costs, until after the master shall have made his report.

Dove v. Everard.

Rolls.—1830; February 11.

If one of two persons named trustees and executors, disclaims and renounces, and afterwards possesses himself of assets as the agent, of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate.

The testator, who was a farmer, appointed Everard and Manby his trustees and executors. At a meeting of the family, held immediately after the testator's death, Everard stated, that, as he was a creditor of the deceased, he had better not act and it was agreed that the opinion of counsel should be taken on the point. Counsel advised him not to act; and, on the 21st of February, he executed a deed of disclaimer as to the real estate, and renounced probate in the ecclesiastical court. However, as Manby, who alone proved the will, was unacquainted with the management of farming stock, or with its value, Everard took an active part in the conversion of the assets into money: but he stated, that he did so merely as the agent of Manby; and that he paid to him, or applied according to his direction, and accounted to him for, all the moneys which had thus come into his hands.

Under these circumstances Everard had been made a party defendant to a suit for the administration of the assets; and the question was, whether he was a necessary or proper party.

[1] As to sale of expectant or reversionary interests, see Lloyd & G. 74, 75, note. The *Earl of Portmore* v. *Taylor*, 4 Sim. 182. As to inadequacy of price, Ibid. 3 Russ. 435, n. 1. *Seymour* v. *Delancey*, 3 Cow. 445. *Williamson* v. *Dale*, 3 Johns. Ch. Rep. 292. *Maddeford* v. *Austwick*, 1 Sim. 89.

[*232] *Mr. *Treslove*, and Mr. *Skirrow*, for the plaintiff, cited *Read* v. *Truelove*,(a) and contended, that Everard, having possessed himself of the assets, became accountable as executor and trustee, notwithstanding his disclaimer and renunciation, and that it was not competent to him to refer his possession to his supposed delegated character of agent.

Mr. *Bickersteth* and Mr. *Rolf*, contra, submitted, that Everard had intermeddled with the assets only as the agent of Manby, to whom alone he was accountable, and not to Manby's *cestuis que trust*.

The Master of the Rolls was of opinion that Everard had not acted as trustee and executor; and that he ought not to have been made a party. The bill was therefore dismissed as against him with costs.[1]

Fowler v. Garlike.

Rolls.—1830; February 16.

Where the trust is too vague for the court to execute the next of kin are entitled.

A testatrix bequeaths the residue of her property to her executors, upon trust to dispose of the same at such times and for such purposes as they should think fit; it being her intention that the distribution thereof should be left entirely to their discretion; held, that the executors were trustees of the residue of the property for the next of kin of the testatrix.

Sarah Hatrell, after bequeathing to Bennett Garlike 300 guineas, and to Thomas Browne 100 guineas, and giving legacies to various persons who were distantly related to her, disposed of the residue of her property in the following manner:—"And whereas I have the power to dispose by will of the sum of 2000*l.* which my executors will be entitled at my de-
[*233] cease to receive from the executors of Mr. Thomas *Hatrell of Newcastle under Lyne; now I do hereby direct that the annual interest or dividends thereof shall be paid and applied, at the discretion of my executors, to and for the use of my sister, Mrs. Dorothy Hatrell, during her life; and as to the said principal sum of 2000*l.* (subject to such my said sister's life interest therein,) and all and singular other my estate and effects whatsoever and wheresoever, real and personal, not hereinbefore disposed of, and every part, share, or interest therein respectively, of or to which I now am, or at the time of or immediately before my decease shall be, possessed or entitled, in possession, expectancy, or otherwise howsoever, or whereof I have the power to dispose in any wise, I give, devise, and bequeath, limit, appoint, and dispose of the same and every parcel thereof respectively, to the said William Bennet Garlike, and Reverend Thomas Brown, to hold to them, their heirs, executors, and administrators, accord-

(a) Ambler, 417.

[1] Vide *Davis* v. *Spurling*, ante, 64.

ing to the nature and tenure of such property, upon trust to dispose of the same at such times and in such manner, and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." She then appointed Garlike and Brown her executors, empowering her said trustees and executors to convert all her property into money, and to invest the proceeds on securities, which they were to vary at pleasure, and directing that each should be accountable only for his own receipts.

The bill was filed by persons to whom legacies had been given, claiming to be entitled beneficially, as next of kin of the testatrix, to the residue of her property.

Mr. *Tinney* and Mr. *Skirrow*, for the plaintiffs:—It is evident from the language of the will that Garlike and Brown were not to take the residue beneficially; *they were to be trustees for some person or [*234] other, and for some purpose or another; but who those persons are, or what that purpose is, the testatrix has not explained. The objects of the trust being thus left uncertain, the residue must be considered as not disposed of, and will go to the next of kin. *Vezey* v. *Jamson*,(*a*) *Morice* v. *The Bishop of Durham*,(*b*) *James* v. *Allen*.(*c*)

Mr. *Bickersteth* and Mr. *Turner*, for the defendants in the same interest.

Mr. *Pemberton* and Mr. *Chandlees*, for Garlike and Brown:—In the cases cited some object of benevolence or charity was pointed out distinctly. Here, to use the words of Sir William Grant, in *Gibbs* v. *Rumsey*,(*d*) we have "nothing but a purely arbitrary power of disposition, according to a discretion which no court can either direct or control." "It is not to be contended," adds that great judge, "that if the words were, 'to be disposed of according to their discretion,' that would have qualified the preceding gift." This is almost in terms the case which Sir W. Grant contemplated.

The words of the bequest give the absolute beneficial interest to the executors: they are to dispose of the residue for such uses as they shall think fit; the distribution of it is left entirely to their discretion. Such powers amount to a complete right of property, and words so express must exclude any trust for the next of kin. What is there to hinder a testator from giving his property to such persons or person as a certain individual shall think fit to select? "Supposing," says *Sir William Grant, in *Gibbs* v. *Rumsey*,(*e*) "the testatrix after this gift to the executors, had requested [*235] them to give the residue to such persons, and in such manner, as they may think proper and expedient, there would have been no trust, notwithstanding the words, on account of the uncertainty of the object. It is said the testatrix meant the executors to give this property to somebody, and not to enjoy it themselves: but that might be said in every case of a bequest to give to

(*a*) 1 Sim. & Stu. 69. (*b*) 9 Ves. 399. 10 Ves. 522. (*c*) 3 Mer. 17.
(*d*) 2 Ves. & B. 297. (*e*) 2 Ves. & B. 298.

objects not distinctly specified, and in every case of a general power of appointment. It would be necessary to show that these executors not only cannot enjoy it themselves, but have no right to appoint it to others; as, whether they have the absolute property or only a power to appoint the residue, still the claim of the heir or next of kin is premature, until it shall be seen whether any appointment will be made. It was insinuated in the argument that this was probably a secret trust for charity. If that were so, it would be void; but there is nothing in the case entitling me to form such a conclusion. Therefore neither the heir nor the next of kin has a right to call upon the executors to account for the residue." These *dicta* of Sir William Grant dispose of the present question.

However, if it be considered that there is in this will enough to indicate an intention that the executors were to apply the property to purposes of charity and benevolence, they will be most ready to concur in such an employment of the funds either under the direction of the court or in the exercise of their own discretion.

THE MASTER OF THE ROLLS was of opinion that this was a plain trust, but too uncertain for a court to execute, and declared the next of kin entitled to the residuary estate.[1]

[*236] *WATSON v. REID [2]

ROLLS.—1830; February 18.

The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance, till about a year afterwards: the bill was dismissed on the ground of unreasonable delay.

IN June, 1826, the defendant entered into a contract to purchase some houses from the plaintiff. An abstract was delivered; and a correspondence with respect to the title took place. But, on the 7th of April, 1827, the defendant gave notice to the vendor that he objected to the title, and abandoned the contract; and on the 1st of May following, he demanded a return of his deposit. The plaintiff refused to return the deposit, but did not take any steps to enforce the contract until the 25th of April, 1828, when he filed his bill for a specific performance.

Mr. *Hayter*, for the defendant, submitted, that a vendor, who, after the purchaser had given notice that he abandoned the contract, allowed so long a pe-

[1] When a trust is void for uncertainty, see further *Ommaney* v. *Butcher*, Turn. & R. 260. *Trustees of Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1. *Ellis* v. *Selby*, 1 Myl. & Cr. 286. S. C. 7 Sim. 352. *Stubbs* v. *Sargon*, 3 Myl. & Cr. 507. S. C. 2 Keen, 255. *Wood* v. *Cox*, 2 Myl. & Cr. 684. S. C. 1 Keen, 317. When an executor, &c takes beneficially, see *Hames* v. *Hames*, 2 Keen, 646, 653, note, and cases there cited.

[2] S. C. Taml. 281.

riod to elapse without taking any step to enforce performance, was not entitled to the assistance of a court of equity, and ought to be left to his remedy at law. The inactivity of the vendor might further be considered as acquiescence in the abandonment of the contract; and the situation of the purchaser might have been materially different, if the attempt to compel the performance of the contract had been made without delay.

Mr. *Preston* and Mr. *Ching*, contra:—It is of course that there should be a reference of the title to the master. Never till now was it suggested, that a vendor, who, instead of rushing instantly into a suit, waited for nine or ten months before he took that step, thereby lost his right to the assistance of a court of equity. As the vendor was always ready and [*237] willing to perform the contract, and to make a good title to the premises, the notice of abandonment was of no avail. Delay may with more reason be imputed to the purchaser, who has not attempted to enforce the return of his deposit, than to the vendor, who allowed a year to elapse before he filed his bill.

The Master of the Rolls dismissed the bill with costs, on the ground of unreasonable delay in filing it.[1]

Barton *v.* Tattersall.[2]

Rolls.—1830; February 15, 23.

A person, who had taken the benefit of the act for the relief of insolvent debtors, first in 1814 and a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency: Held,

That the assets ought to be applied in payment first of these subsequent debts; and secondly of the debts scheduled under the second insolvency; and, thirdly of the debts scheduled under the first insolvency:

That a court of equity had jurisdiction so to administer the fund: and

That the right of the creditors to such relief was not affected by the statute of limitations.

On 14th of September, 1814, Phillip Jacobs took the benefit of the act then in force for the relief of insolvent debtors, and was discharged by the insolvent debtors' court. The schedule, which on that occasion was annexed

[1] Vide 2 Keen, 227, n. 2 Story's Eq. Juris. § 771, and cases there cited. "The question which has been discussed in this case is, whether the defendant remains under any obligation to perform the agreement. He says he does not, &c. Now as I have before stated, where the contract and the circumstances are such, that time is not in this court considered to be of the essence of the contract,—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and when the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done, or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs." Lord Langdale, M. R. under the particular circumstances of the case, however, a specific performance was decreed upon the plaintiff's showing a good title. *Taylor* v. *Brown*, 2 Beav. 180. And see *Benedict* v. *Lynch*, 1 Johns. Ch. Rep. 370.

[2] S. C. Taml. 378.

to his petition, enumerated debts due to sixty-seven different creditors, and amounting in the whole to 2280*l.*, and specified assets amounting to between 8*l.* and 4*l.* only. The usual assignment to the provisional assignee was executed.

On the 22d of February, 1820, Jacobs was again discharged under the acts for the relief of insolvent debtors, entered into the requisite re-
[*238] cognizance, and executed the usual assignment to the *provisional assignee. The debts scheduled on that occasion amounted to nearly 1000*l.*, and the assets to about 14*l.* He subsequently acquired considerable property, but paid none of the debts contracted previously to either of his insolvencies; and he died on the 4th of December, 1826, leaving assets of such an amount, that there would remain a considerable surplus, after all his debts, incurred since the 22d of February, 1820, were satisfied.

The plaintiff was a creditor of Jacobs under each of the insolvencies, and under each of them had been appointed assignee of his estate in trust for the creditors. The bill was filed against Jacobs' executor, in order to have the surplus of the assets, after payment of the debts contracted by Jacobs since his last discharge, applied towards the satisfaction of the debts set forth in the schedules of the insolvent.

Mr. *Pemberton* and Mr. *Parker*, for the bill:—The 53 G. 3, c. 102, created the court for the relief of insolvent debtors: and, by the tenth section, the court is directed to order an engagement to be executed by the petitioner, seeking the benefit of the act, "to pay so much of the just debts and demands of the several persons against whom such prisoner shall by such court be adjudged entitled to the benefit of this act, as shall not be paid out of the estate and effects to be conveyed and assigned by such prisoner for such purpose, in case he or she shall at any time thereafter be enabled to pay such debts and demands, or to pay such part or parts thereof as he or she shall be able at any time to pay, &c.; and judgment shall thereupon be entered in such court against such prisoner, in pursuance of such engagement, which judgment shall and may, if the court shall so order, be executed against the future estate and effects of such
[*239] prisoner, real and personal, as such *court shall direct, and shall bind the assets of such prisoner, real and personal, in the hands of his heirs, executors, and administrators, for the full amount of the debts and demands aforesaid which shall remain unsatisfied, or so much of such debts and demands as the said court shall be of opinion ought to be satisfied, and execution shall be had upon such judgment in such and the same manner as execution may be had upon a judgment in the court of king's bench." This clause keeps the debt in full force against the assets of the debtors; and the creditor must have the same remedies against the assets, as if the debtor had not been discharged from his personal liability. The 54 G. 3, c. 23, which came into operation on the 10th of December, 1813, was passed in order to amend the preceding act; and the fourteenth section,

after repealing the clause which required the prisoner to execute an engagement, enacts, that, "instead thereof, the court shall require such prisoner to enter into a recognizance to the king's majesty for the full amount of such debts, and it shall be lawful for any creditor or creditors of such prisoner from time to time to apply to the said court to have such recognizance put in suit, and the same shall be put in suit in pursuance of the order of the said court for that purpose," &c.

It is clear that the statute of limitations cannot run against the scheduled creditors of an insolvent who is discharged under these acts. The person of the debtor is protected; but his property, however remote the time at which it may be acquired, continues liable to answer the demands of his creditors. The mere existence of the judgment, as a security for all the creditors, would prevent their debts from being barred. The act professes indeed to give a particular remedy against the debtor's property; but that remedy has been found practically *altogether insufficient. The present plaintiff [*240] has applied to the insolvent debtor's court, and obtained every assistance it could give; but that assistance has been found to be totally ineffectual for any useful purpose. He stands, therefore, in the situation of a person who, in common with the other creditors of the deceased, has a legal claim against the assets, and he has a right to have effect given to that claim by the administration of the assets in this court.

Mr. *Bickersteth* and Mr. *Merivale*, contra:—The debts of the creditors, for whose benefit this suit is instituted, would have been bound by the statute of limitations, if the debtor had not taken the benefit of the insolvent acts. The question then is, what is there in the provisions of the insolvent acts to put the creditor in a better situation, than if insolvency had not occurred? He is deprived of his remedy against the person; his remedies against the property of the debtor remain. But what is there to prolong the duration of those remedies? The 52 G. 3, c. 165, s. 54, declares, "that nothing therein contained should be deemed or taken to discharge the future estate or effects, real or personal, of any person or persons discharged under the act, and that all and every person or persons entitled to receive or be paid any such debts, damages, costs, sum or sums of money, should have all such and the like remedies in law and equity against such future estate and effects, other than and except the necessary apparel and bedding of such person or persons and their family, and the necessary tools for his, her, or their trade and occupation, not exceeding the value of 40*l*., but not against the person of the party for payment thereof, as he, she, or they might have had, if that act had not been made." The principle of the act, as to the insolvent, seems to be, that the creditor is to have *the same right to payment out of the [*241] future assets of the debtor, as if the insolvency had not occurred; why then should the lapse of time fail to have its usual operation? No argument in favor of the plaintiff's claim can be raised from the subsequent statutes of 1 G. 4, c. 119; 3 G. 4, c. 123; 5 G. 4, c. 61 and 6 G. 4, c. 121;

and the 7 G. 4, c. 57, furnishes an inference against him. That act, seeking to remedy the defective state of the law, requires the insolvent to execute a warrant of attorney, on which a judgment for the amount of the debts stated in the schedule is to be entered up in one of the superior courts at Westminster; "(a) and if at any time it shall appear to the satisfaction of the said court, that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the said court may permit execution to be taken out upon such judgment for such sum of money, as, under all the circumstances of the case, the said court shall order; such sum to be distributed rateably amongst the creditors of such prisoner, according to the mode hereinbefore directed in case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said court." This special proviso shows that the framers of the act considered it necessary to guard expressly against the lapse of time.

[*242] *Besides, it would appear, that the rights, which are reserved to creditors against the future property of the insolvent, are not absolute; they are to be exercised through the instrumentality of the insolvent debtors' court, and are to be subject to its discretion. In intermeddling with such matters, and in assuming to itself power to regulate or administer the rights or remedies created by these statutes, a court of equity seems to be stepping out of its proper sphere.

February 23.—The Master of the Rolls:—By the several acts for the relief of insolvent debtors, if the assets of the insolvent are at the time of his death more than sufficient to pay his subsequently contracted debts, they shall go in discharge of the debts from which he was relieved by the insolvent acts: and a particular mode is prescribed in which the benefit of that provision is to be obtained. That mode has not been followed in the present case; and the question is, whether a court of equity has authority to administer the assets in discharge of those debts. I am of opinion that it has such authority.[1]

The insolvent here had twice taken the benefit of the acts; and it appears to me that the order of payment must be, to pay *last* the creditors who claim under the *first* insolvency.[2]

(a) Section, 57.

[1] The jurisdiction of the court is also asserted by Sugden, Ld. Ch. *Byrne* v. *Byrne*, 1 Conn. & Law. 189; and O'Loghlen, M. R. in S. C. 1 Flan. & Kel. 435.

[2] Where a person has twice taken the benefit of the insolvent debtor's act, a *chose in action* to

I do not consider the lapse of time as of the least importance; for here the liability arises in respect, not of a promise, but of a lien created by the statute.[1]

"His Honor doth declare, that the surplus assets of the testator [*243] Philip Jacobs, after payment of his funeral and testamentary expenses, and debts since his last insolvency, are applicable, first, to the payment of the debts under the second insolvency, and then in the payment of his debts under the first insolvency," &c.

Reg. Lib. 1829, A. 1111.

ATTORNEY GENERAL *v.* ACKLAND.

ROLLS.—1830; February 24.

If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes, receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will; the trust thus executed is contrary to the mortmain act, and will not be carried into effect by the court.

A TESTATOR left a sum of money upon trust, to be laid out in lands for charitable purposes. The trustee of the legacy received the money and with it bought lands, of which he took a conveyance to himself upon the trusts expressed in the will.

The question in the suit was, whether, as the trustee had taken a conveyance of the lands in trust for a charitable purpose, the court would not execute the trust thus created, though it would not have given effect originally to a bequest which was contrary to the mortmain act.

Mr. *Pemberton*, for the information.

Mr. *Bickersteth* and Mr. *Beames*, contra.

THE MASTER OF THE ROLLS held, that a trustee could not, by so acting, give effect indirectly to a bequest which was contrary to the mortmain act.[2]

which he became entitled between his first and second insolvencies, passes to the assignees under the second insolvency. *Curtis* v. *Sheffield*, 8 Sim. 176.

[1] Acc. *Byrne* v. *Byrne*, 1 Flan. & Kel. 435. S. C. 1 Conn. & Law. 189.

[2] Vide *Baker* v. *Sutton*, 1 Keen, 224.

[*244] *JOHNSON v. TELFORD.

ROLLS.—1830; February 25.

An heir is not put to his election between a Scotch estate and benefits given to him by a will, by the force of mere general expressions: especially if the uses of the will are not applicable to Scotch property.

An heir is not to be disinherited by ambiguous expressions.

A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, and directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, his heir at law, or other real representatives, and every other person in whom the same should be vested, should, forthwith upon his decease, convey and assure the same to his trustees upon the trusts of his will; he purchased other estates afterwards: held, that, as to the subsequently purchased estates, a case of election was not raised against the heir taking benefits under the will.

JOHN SIMPSON, by his will, dated the 12th of August, 1807, gave, devised, and bequeathed, limited, and appointed all and every his real and personal estate, whatsoever and wheresoever, which he, or any person in trust for him, were or was, or should be seised or possessed of, or entitled to, in possession, reversion, remainder, or expectancy, and all his estate or interest therein, subject to the payment of his debts, funeral expenses, and certain annuities and legacies, unto and to the use of Thomas Telford and Joseph Loxdale, their heirs, executors, administrators, and assigns, upon trust that they, and the survivor of them, his heirs, executors, administrators, and assigns, should, during the joint lives of his the testator's two daughters, Jane Johnson and Mary Ann Newton, pay the interest, dividends, and annual produce of all his said real and personal estate and effects, into the hands of his two daughters, in equal shares and proportions, for their respective sole and separate use; and that, from and immediately after the decease of his daughters respectively, they should stand seised and possessed of his real and personal estate and effects, upon certain trusts for the benefit of the children of Jane Johnson and Mary Ann Newton, and their issue: with limitations over, in default of issue of the daughters. The will, also, gave the trustees power to sell the real estate, and authorized

[*245] *them, during the life of the testator's daughters, to revoke all the limitations to them and their issue, and to declare in what other manner they, the trustees, or the survivor of them, or the heirs, executors, administrators, or assigns, of such survivor, should stand seised and possessed thereof, for the benefit of his two daughters, their husbands and issue.

The testator made a codicil, dated the 26th of May, 1811, which contained the following clause:—

"Whereas I have, since the publishing of my last will and testament, purchased certain freehold estates in and near the Castle Foregate, in the town of Shrewsbury," &c., "now, I do hereby give and devise, direct, limit, and appoint the same estates and premises, with the hereditaments and appurte-

nances, unto and to the use of Thomas Telford and Joseph Loxdale, their heirs and assigns for ever, upon the trusts, and to and for the intents and purposes expressed and contained in my will, of and concerning my other freehold estates devised by me to them in my said will: and if it shall happen that any hereditaments purchased by me at any time or times, should happen to be conveyed after the date and publishing hereof, then I direct and appoint, that my heir-at-law or other real representatives, and every other person in whom the same shall be vested, shall forthwith, upon my decease, convey and assure the same unto and to the use of Thomas Telford and Joseph Loxdale, their heirs and assigns for ever, upon the trusts, and for the intents and purposes contained in my will, of and concerning my real estate devised to them by my said will."

The testator, at the time of his death, was seised of real estates in Scotland, of which he had acquired some *before the date of his [*246] will, and others, subsequently. After the date of the codicil, he purchased freehold and copyhold lands in England, which were duly conveyed to him.

Jane Johnson and Mary Ann Newton were the co-heiresses of the testator, according to the laws both of England and of Scotland, and according to the customs of the manors of which his copyholds were holden. The bill was filed by their children, praying a declaration that the co-heiresses, Jane Johnson and Mary Ann Newton, were bound to elect either to give effect to the will and codicil as to the heritable estates in Scotland, and to the codicil as to the subsequently purchased freehold and copyhold lands in England, or to lose the benefits given them by the will.

There were two questions in the cause:

First, Whether the daughters were put to their election between the Scotch estates and the benefits given to them by the will; and,

Secondly, Whether, if they claimed the benefits given them by the will, they were bound to convey the estates purchased after the date of the codicil to the uses of the will.

Mr. *Tinney* and Mr. *Barber*, for the plaintiffs.

Mr. *Temple*, for the trustees.

Mr. *Treslove* and Mr. *James Wilson*, for the co-heiresses:—On the first point, it was argued on behalf of the plaintiffs, that the decision of Sir William Grant, in *Brodie* v. *Barry*,(a) established, that an Eng- [*247] lish will, though inoperative to pass real estates in Scotland, was sufficient to raise a case of election against a Scotch heir who took benefit under it. In this case, as in that, the will and codicil as testamentary instruments, had no operation on the Scotch estates; but they manifested a clear intention to subject the whole of the testator's property, wherever it might be situate, to the same series of trusts. This intention would be in part defeated, if the

(a) 2 Ves & B. 127.

co-heiresses were to take the fee of the lands in Scotland; and they could not be allowed to defeat some of the dispositions contained in the will, and at the same time to enjoy the benefits which it gave them.

On the second point, *Thellusson* v. *Woodford*(*a*) was cited, to show that an heir might be put to elect between the benefits given him by the will and lands purchased after the date of it. The only question, therefore, was, whether, in the present case, the testator had manifested an intention to dispose of the after purchased lands. Now, the codicil contained, first, an express devise of the freeholds at Shrewsbury, which, though purchased, had not been conveyed to him; and he next directed, that "if it shall happen that any hereditaments, purchased by him at any time or times, should happen to be conveyed after the date of the codicil," those hereditaments should upon his decease be conveyed to his trustees, upon the trusts expressed in his will. This last proviso was general in its expression: it extended to all hereditaments purchased by him at any time, and would, therefore, include subsequently acquired lands; and it could not have been inserted with a view merely to the freeholds in Shrewsbury, for those had been expressly devised by the preceding clause.

[*248] *For the co-heiresses it was said, that in the will no mention was made, and no notice was taken, of the Scotch estates. The words were such as a testator, disposing only of land in England, would have used; and there was no reason for extending them to such hereditaments as were not the proper subject of testamentary disposition. The nature of the limitations, too, seemed to show that testator had in his contemplation only lands in England. In *Brodie* v. *Barry* the Scotch estates were specified in the devise.

The codicil appeared to have been made in order to pass the freeholds which the testator had purchased in Shrewsbury. For this purpose the testator devised them to his trustees; and, as that devise would pass only an equitable interest, and as it might have been revoked by a subsequent conveyance of the legal fee,(*b*) if that conveyance were not unqualified, he added a direction that the person, in whom any interest, which might be conveyed to him, should become vested, should assure the same to his trustees.

The Master of the Rolls:—In the case of *Brodie* v. *Barry* the Scotch estate was mentioned in the will, and expressly intended by the testator to pass thereby. In this will no notice whatever is taken of the Scotch estate; and the question is, whether it is clearly to be collected, from the general words used, that the testator meant to pass his Scotch estate to the uses of his will. Where a testator uses only general words, it is to be intended that he means these general words to be applied to such property as will,

[*249] in its nature, pass by his will, and to the uses *therein expressed. His will cannot affect his Scotch estates, and some of the uses ex-

(*a*) 13 Ves. 209. 1 Dow. 249. (*b*) *Ward* v. *Moore*, 4 Mad. 368.

pressed in his will cannot be applied to Scotch property.[1] I am of opinion, therefore, that the co heirs are not put to elect between the Scotch estate and the benefits given to them by the will.[2]

With respect to the question on the codicil, the expressions used are not sufficently certain to exclude the co-heirs from the descended estates which were purchased after the codicil. The language used in the codicil does not refer to estates purchased after the codicil, but to estates which shall happen to be conveyed after the codicil; and I cannot, as against the co-heirs at law, extend the testator's meaning beyond the natural force of his expressions.[3]

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*CHURCHMAN *v.* IRELAND.(*a*) [*250]

1831.—December 13, 14, 20.

A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir, taking benefits under the will, must elect.

THOMAS IRELAND, by will bearing date the 18th of May, 1820, and duly executed and attested, gave, devised, and bequeathed, "all and singular my estate and effects whatsoever and wheresoever, and of what nature or kind soever, both real and personal, which I shall die possessed of, interested in, or entitled unto," to three trustees, their heirs, executors, administrators, and assigns, upon trust, to apply a portion of the rents, interest, and dividends, towards the support of the testator's son John, and, subject to the payment of certain other sums, upon trust, to invest the residue of such rents, &c. in government or other good securities, and after the death of his said son, to sell and dispose of all his (the testator's) then real and personal estate, and to distribute one-third part of the moneys arising from such sale among all the children of his said son, and to pay and apply the other two-thirds in manner therein mentioned.

In the year 1824 the testator purchased a field adjoining to his other estate; and, in the month of July, 1827, he died, leaving the defendant Thomas Ireland, the eldest son of his son John (who had died in the testator's lifetime,) his heir at law. The bill prayed, among other things, that, in respect of the property acquired subsequently to the execution of the will, the heir at law, who was one of the legatees, might be put to his election.

*THE VICE-CHANCELLOR having decided that the heir was bound [*251] to elect, an appeal was now brought from that decision.[4]

(*a*) This case is inserted here in consequence of the connection of the point decided in it with that which was discussed in *Johnson* v. *Telford*.

[1] Vide *Chapman* v. *Robertson*, 6 Paige, 630.

[2] Vide 3 Russ. 257, n. 2.

[3] See the next case.

[4] The case before the Vice-Chancellor, Sir L. Shadwell, is reported, 4 Sim. 520.

Mr. *Tinney* and Mr. *Bagshawe*, for the heir at law:—According to the established principles of the court, an heir is never to be put to his election, as at law he is not to be disinherited, by any thing short of express condition, or plain and necessary implication. There is no such implication here: for by the phrase "all my estate which I shall die possessed of," the testator may naturally be supposed to have intended all that he then possessed and was capable of passing by the will, as if he had said, "all that is now mine and shall continue to be mine till my decease." That perhaps is a less probable, but it is a possible, as well as the strictly grammatical, meaning; for the words construed literally, amount to no more than "all such of my present estate as I shall die possessed of;" and so long as a construction can be put upon the instrument consistent with the rights of the heir, the court will not presume an intention on the part of the testator to defeat those rights, especially if, as in this instance, that presumption must be founded upon another presumption equally inadmissible, that the testator in making the gift contemplated an act which was contrary to the statute of wills, and consequently was void at law. These principles were recognized and adopted by Sir T. Plumer in *Back* v. *Kett*,(*a*) where the words were nearly the same as they are in this will; and where his Honor had no difficulty in deciding, that a case of election did not arise. That case, indeed, was not so strong in favor of the heir as the present; for there, apparently, there was no reference to the property as it stood at the date of the will, such as there is here, in [*252] the description of "*my* estate;" nor was there what also exists here, a mixed fund, consisting of both real and personal estate, to the latter of which, solely, the prospective words might be held reasonably and legally to apply. *Back* v. *Kett* has never been impeached, and it is perfectly consistent with the judgment in *Thellusson* v. *Woodford*,(*b*) where the intention was manifest and unequivocal; for the testator, by expressly referring to after purchased estates, in terms that purported to devise them, left no room for any other conclusion than the one at which the court arrived.

Sir *Edward Sugden* and Mr. *Jacob*, contra:—The construction attempted to be put upon these words is forced and unnatural, and quite repugnant to their ordinary sense—the sense in which a testator must always be understood to use them. To raise a case of election it is not necessary that the implication be unavoidable; it is enough that it be highly probable. Thus, in *Blunt* v. *Clitherow*,(c) a devise of all copyhold estates, generally, was held in equity to pass copyholds not surrendered to the use of the will, as well as those which had been surrendered, and the customary heir was obliged to elect. Here the blending of the real and personal estate into one mass, and the gift to the trustees of the whole that the testator should die possessed of, for the purpose of a sale and distribution to be afterwards made of all his "then real and personal estate," place the intention beyond doubt. It is im-

(*a*) Jac. 534. (*b*) 13 Ves. 209. 1 Dow, 249. (*c*) 10 Ves. 589.

possible to sever the two species of property, and apply the prospective clause to the personalty only: as to that, indeed, the words would be superfluous; and they must therefore have referred, if any distinction were intended, to the reality. The present case, in this respect, is more unfavorable to the heir than that of *Back* v. *Kett*, *which, however, does not seem [*253] to have been much argued, and which, to a certain extent, stands opposed, if not to the judgment, at least to the doctrines laid down in *Thellusson* v. *Woodford*. Sir T. Plumer, it is obvious, did not approve of the decision in *Thellusson* v. *Woodford*, and would have determined otherwise had the question come originally before him. That circumstance materially diminishes the weight due to his Honor's judgment in *Back* v. *Kett*. *Thellusson* v. *Woodford* is of the highest authority: after a solemn decision made upon great consideration by Lord Erskine, it was affirmed in the house of lords: it has been universally considered as fixing the rule; and the principles, on which it proceeds, fully support the decree of the Vice-Chancellor in the present instance.

Mr. *Tinney*, in reply.

December 20.—The Lord Chancellor(*a*) :—In this case, it was contended that the words must be understood not as looking forward to the whole of the lands which the testator might possess at his decease, including the property he might acquire after the execution of his will, but as referring to such estates only as he was possessed of at the time when the will was made, and which should continue in his possession down till the period of his death;—that when a person in his will says, "all my estates which I shall die possessed of," it is the same thing as if he had said, "all my estates, which, being now mine, shall be mine till my decease;" in other words, "all that estate on which my will can operate." I must admit that the case of *Back* v. *Kett* goes a certain way in support of that position; nor can I altogether reconcile *the judgment there given with the prior case of [*254] *Thellusson* v. *Woodford*, which, if *Back* v. *Kett* be to stand as law, is certainly considerably broken in upon by the decision of Sir T. Plumer. *Thellusson* v. *Woodford* is referred to by his Honor in terms of considerable doubt and hesitation, in a manner clearly showing, that, had it originally fallen to him to decide it, he would have come to a different conclusion. Nevertheless, *Thellusson* v. *Woodford* is a case of the highest authority; especially valuable for the clear and able manner in which the argument is put in the judgment of Lord Erskine, who did not deliver his opinion till he had given the fullest deliberation to the question, and taken great pains to satisfy his mind. His Lordship states his reasons with his usual distinctness: they are such as to carry complete conviction with them; and at all events they have since received the sanction of the house of lords.

(*a*) Lord Brougham.

I cannot, therefore, see the least foundation for the doubt attempted to be cast upon that case; and although, perhaps, *Thellusson* v. *Woodford* is not in necessary contrast with *Back* v. *Kett*,—although the two cases may even by possibility stand together, inasmuch as in the former, the words may be said to evidence more strongly an intention to deal with after purchased property,—certainly the doctrine laid down in that case is inconsistent with *Back* v. *Kett*, and with the argument urged at the bar in support of this appeal.

This will, therefore, raises a case of implied condition, and the heir is bound to elect. The judgment of the Vice-Chancellor must be affirmed; but, considering how closely *Back* v. *Kett* resembles the present case, I shall affirm the decree without costs.[1]

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[255] *JONES *v.* SCOTT.

1830; February 26.

A trust for the payment of debts in a will of personal estate will prevent the operation of the statute of limitations.

Semble, That notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute of limitations.

But *semble*, A debt is not taken out of the statute of limitations by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient.

IN November, 1815, Richard Donovan, Esq., barrister at law, made his will, not dated, but executed and attested in such manner as to pass freehold estates by devise; and thereby, after reciting, amongst other things, that he was seised in fee of an estate at Tibberton, he gave and devised all his real estates at Tibberton, or elsewhere in England, and all his personal estates in England, or in the West Indies, or elsewhere, of every kind, unto and to the use of Thomas Rodie and William Montague, and their heirs, executors, and administrators, upon trust to collect and get in all his personal estate, and pay his debts thereout, if the same should be enough for that purpose; and as to his estate called Tibberton Court, and every part thereof, except the advowson of Tibberton, upon trust to let the same ready furnished, and to pay the proceeds thereof in the manner following, that is to say, the sum of 150*l.* per annum to his wife, Caroline Elizabeth Donovan, being the interest of 3000*l.*, part of her settlement, which was vested in the purchase of the Tibberton Court estate, and as to the remainder thereof, in trust to pay the same to his daughter Caroline Anne Donovan during her life, her receipt alone to be a sufficient discharge; and in case his personal estate should be enough to pay his debts, without having recourse to selling his wine, linen, plate, and books

[1] Vide 2 Story's Eq. § 1094. Jac. 535, n. 3.

then he gave his wine and linen to his wife, absolutely, for her own use; but in case his personal estate should not be enough to pay off and discharge his debts, *then he directed his trustees to sell all his personal [*256] estate of every kind, except his linen, which he gave to his wife as before, and also to sell the next presentation to the rectory of Tibberton, to enable them to pay off all his debts; and in case his debts could not be paid off and discharged from all his personal estate, then he directed that his real estate at Tibberton aforesaid, devised to his said trustees, should be either mortgaged or sold, as his trustees should think best for his family, for the purpose of discharging his debts; and subject thereto, he devised the estate, in case he should die without leaving issue male, to his daughter Caroline Anne Donovan for her life, with remainder to her first and other sons in tail male.

The testator died in July, 1816.

Thomas Rodie proved the will, and died in 1818. The daughter had not then attained the age of twenty-one years: and letters of administration *de bonis non*, with the will annexed, during her minority, were granted to her husband, the defendant Scott. In 1819, she attained her full age; and procured letters of administration of the unadministered effects of her father, with his will annexed.

In January, 1822, Mrs. Scott published in the Gloucester newspaper an advertisement in the following words:—"Notice is hereby given by me, Caroline Anne Scott, of Tibberton Court, in the county of Gloucester, administratrix, with the will annexed, of my late father, Richard Donovan, of Tibberton Court aforesaid, and of the city of Gloucester, Esq., barrister at law, to all persons having or claiming to have any demand upon the estate of the said Richard Donovan, by specialty or otherwise, that they send in their several and respective *statements of their demands, and also attes- [*257] ted copies of their several and respective securities, to Messrs. Clark, Richards, and Metcalf, solicitors, 109 Chancery Lane, London, or to Mr. Bubb, solicitor in Cheltenham, in the county of Gloucester, on or before the 24th day of April next, for their examination prior to the same being laid before John Hawksey Acherley, of the city of Bath, Esq., barrister at law, by whom I expect that the persons claiming to be creditors of the said Richard Donovan, do submit to be examined touching and concerning the same, if the said John Hawksey Acherley shall see occasion, in order to their respective claims being approved and paid, or rejected, if such latter course be deemed expedient. Timely notice as to time and place will be given in the London Gazette, and in the Gloucester and Liverpool papers."

The general personal assets of the testator having been found to be not nearly sufficient for the payment of his debts, steps were taken to sell the Tibberton Court estate; and it was then discovered that the testator's interest in the property, instead of being freehold, as he had imagined, was only leasehold for a long term of years. In October, 1822, the estate was sold under the trusts of the will for 10,500*l.*

The plaintiffs were creditors of Richard Donovan on the balance of a banking account, which had been ascertained in 1815. In compliance with the advertisement, which had appeared in January, 1822, they, in April following sent in a statement of their demand to Mr. Bubb; and, no notice being taken of it, they, in July, 1823, commenced an action in the common pleas against the administratrix and her husband. That action was met, on the [*258] part of the defendants, by a plea of the statute *of limitations, and was shortly afterwards discontinued. The plaintiffs then, in 1824, filed the present bill, on behalf of themselves and the other creditors of Richard Donovan, praying among other things, that the trusts of his will for the payment of his debts might be carried into execution under the decree of the court. The defendants, by their answer, insisted on the statute of limitations as a bar to the relief.

At the hearing two questions were raised. First, whether the devise of the Tibberton leasehold estate in trust to pay the testator's debts would prevent the statute of limitations from running against these debts? secondly, whether the advertisement, published by the administratrix in January, 1822, took the case out of the statute of limitations?

Mr. *Pemberton* and Mr. *Farrer*, for the plaintiffs:—This debt at the testator's death was a valid subsisting demand, not barred by the statute; and a trust or charge, created by will for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime. *Burke* v. *Jones*,(*a*) *Hughes* v. *Wynne*,(*b*) *Hargreaves* v. *Michell*.(*c*)

This is a consequence which follows from the nature of a trust, and is not dependent on the nature of the property which is the subject of the trust. Whether the property be realty or personalty, the result must, as to this point, be the same.

In *Andrews* v. *Brown*(*d*) it was held that, "if the debtor had made his will and directed that all his debts should be paid, or made any provision [*259] for the payment *of his debts in general, this would revive such a debt, and bring it out of the statute, so that his executors would be liable to the payment of that debt amongst the rest."

The advertisement calls on all persons, having claims on the testator, to bring in statements of their demands by a certain day, in order to their being approved and paid, or rejected. In *Andrews* v. *Brown* it was held "that if a man has a debt due to him by note, or a book debt, and has made no demand of it for six years, so that he is barred by the statute of limitations, yet if the debtor, after the six years, puts out an advertisement in the Gazette, or any other newspaper, that all persons who have any debts owing to them from him will apply to such a place, that they shall be paid; this (though it were general, and therefore might be intended of legal subsisting debts only,) yet amounts

(*a*) 2 V. & B. 275.
(*b*) 1 Turn. & Russ. 307.
(*c*) 6 Mad. 326.
(*d*) Prec. in Chan. 386.

to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again." Thus, it is clear that, if the advertisement had invited the creditors to present their claims in order to their being approved and paid, the administratrix could not have insisted on the statute. But what difference can be made by the addition of words "or rejected?" The demands are not to be approved, till they are examined; they may be approved or not approved according to the case the claimant makes: the words "or rejected" only express one of the possible results of examination, the other possible result being approbation.

Mr. *Bickersteth* and Mr. *G. Richards*, contra:—The advertisement does not contain any promise or acknowledgment: it reserves to the administratrix or her agent the full power of resisting and rejecting any *de- [*260] mand, and of protecting the assets of the testator by "any course which may be deemed expedient."

In all the cases which have been cited, real estate was charged; a new fund was provided for the payment of debts. If the Tibberton Court estate had been, as the testator thought it was, freehold, these authorities would have been applicable to the present question. But it was merely leasehold; and the testator's mistake could not alter its nature or qualities. That leasehold would necessarily vest in his personal representatives, to be applied by them towards the payment of his debts; till the debts were satisfied, the trustees could have no concern with it; it was against the executor or administrator, and not against the trustees, that every creditor would necessarily claim. In fact, a testator cannot, as against his executors, give trustees his personal estate in trust for the payment of his debts; the executors are entitled to have that personal estate for the purpose of paying debts: he cannot interfere with the legal liability of the assets in their hands; and such a trust is in truth a nullity.

Mr. *Pemberton*, in reply:—Though a testator cannot exempt his personal estate from his debts, why should he not have the power of extending or prolonging their liability? We are not questioning the rights of the executor, or lessening the rights of the creditors against the executor and the assets. We leave these rights untouched; but we say that the creditors have also equitable rights against the trust fund which the testator has created. So long as a single debt of the testator, which was not barred at his death, remains unpaid, not one shilling of the proceeds of the Tibberton leasehold can be applied to any other purpose than the satisfaction of his creditors, without a plain violation of the trusts declared in the will.

*The Master of the Rolls:—The law does not permit a tes- [*261] tator to create a special trust of his personal estate, so as to withdraw it from the administration of his executors: whatever he may attempt to do in that respect, all claims must nevertheless be made against the executors; and trustees named in a will can receive only the residue, after all demands on the personal estate are satisfied. The debt of the plaintiff

being, therefore, to be claimed against the executors, and not under the trust, is barred by the statute of limitations.

It is not revived by the notice published in the newspapers; inasmuch as Mr. Acherley might have rejected any debt, upon the ground that the statute of limitations had run against it. Dismiss the bill with costs.

1831; *June* 17.—The plaintiffs appealed from his Honor's decree.

Sir *Edward Sugden* and Mr. *Farrer*, for the appellants:—This will shows an anxious desire to provide for the payment of debts. Although the Tibberton estate was in fact leasehold for a long term, the testator has treated it as a fee simple, probably from a mistake as to its nature or perhaps from the common practice of claiming adversely to the reversioner, in the hope of ultimately establishing in the family a title to it as a freehold. The creation of a trust, or even of a charge upon freehold estate for payment of debts, prevents the statute from running against any debts not barred at the time when the instrument speaks, that is, at the death of the testator. That point has been set at rest by Lord Eldon's decision [*262] in *Hughes* v. **Wynne*.(*a*) *Hargreaves* v. *Michell*(*b*) and *Rendell* v. *Carpenter*(*c*) fully recognize the same doctrine; and till the present case, no distinction in this respect has ever been suggested between freehold and leasehold property. Neither authority nor principle warrants any such distinction. *Burke* v. *Jones*(*d*) only decides that a trust for sale and payment of debts does not revive a demand that has been once barred; but it does not touch the principle on which the operation of an express trust or charge, in keeping alive debts valid at the testator's death, is founded, namely, that an intention is held to be thereby sufficiently indicated to provide for all obligations then subsisting. Looking to it as an index of intention, whether the subject of the trust or charge be really a freehold, or, though treated as such, prove on inquiry to be only leasehold, cannot make the least difference. The result of establishing a trust is, to convert the creditor into a *cestui que trust;* and as it then becomes the duty of the trustee to satisfy the debt out of the trust fund, his mere neglect to fulfil his duty, or the delay of the creditor to enforce his claim, can never prejudice the right; nor is it competent for those who represent the debtor in the administration of his assets, to insist upon an advantage which he has himself by implication directed to be waived. What can it signify whether the property, devoted by will to the pious purpose of saving the testator from sinning in his grave, is or is not by law applicable to that purpose? If a testator has an acre of freehold and a million in the funds, and chooses to create a trust for debts upon both species of property, as he has thereby in effect declared that the statute shall cease to run, it is immaterial whether

(*a*) 1 T. & R. 307.
(*b*) 6 Mad. 326.
(*c*) 2 Y. & J. 404.
(*d*) 2 V. & B. 275.

the real estate be sufficient or not: for his intention (and that is to be the guide) *plainly applies equally to the money as to the land; [*263] and the personalty therefore must equally bear the burden. An opposite rule would involve this singular anomaly, that, while, under a general charge or trust for payment of debts, over all the property both real and personal, debts not barred would fall upon both proportionally, or in the first instance upon the personalty only, the debts, against which the statute had run after the debtor's decease, would remain effectual against his real estate, and his personalty would be altogether discharged from them; a consequence the very reverse probably of what the testator contemplated.

There is nothing in the doctrine of a court of equity inconsistent with the claim of these plaintiffs. So long as a testator leaves a sufficient provision for his debts, he may do so in any mode, however capricious, that he pleases. He cannot absolutely exempt his personal estate from being so applied, but he may, by substituting other adequate means, attain the same object indirectly. Subject to the qualification, therefore, of not breaking in upon the rights of creditors, he may bequeath his leaseholds, or any other part of his personal estate exonerated from his debts; and the court will exercise its authority to uphold such a disposition. Thus, in *Clarke* v. *Ormonde*,(*a*) where a question arose as to the sale of the heir looms, an injunction was granted to restrain executors from disposing of them, there being otherwise ample funds to answer the testator's liabilities: and in *Spode* v. *Smith*(*b*) an arrangement was made with a view to preserve specific articles of personalty from being applied in payment of debts, upon the faith that there was other property sufficient to satisfy the creditors. In like manner the court, in its ordinary decrees, at first merely directs an account of the testator's personal *estate *not specifically bequeathed;* and, even in the absence [*264] of creditors, it will interfere to prohibit a sale, where the personalty is given in a different mode from that which the law would have directed. A testator may out of his leaseholds provide for a debt no longer recoverable at law, as he may also by express words prevent the statute from running after his death. So he may declare generally that his personal estate shall be subject to all his debts,,to those which time has barred, or those which time might otherwise bar, as well as others; and equity will enforce his declared intention.

The testator has here decided the point against his trustees. On his will he has represented himself to be the owner of an estate over which, he conceived, he had full power to create a trust or charge for payment of debts, a charge which would have embraced all debts not barred at his decease. Can a judge, then, be at liberty to refuse effect to that provision, because the estate turns out not to possess the particular character which the testator supposed? The debtor has himself affixed that character to it; and it is not

(*a*) Jac. 108. (*b*) 3 Russ. 511.

because the property is freehold that he acquires the right to charge it, but because the circumstance that it is freehold, or treated as such, is a proof that he meant to go farther than the law would have done, in making it available for the discharge of his obligations.

Supposing the will itself not to be sufficient for that purpose, still the notice published by the executors before the six years had elapsed would take the case out of the statute: *Andrews* v. *Brown*,(a) an authority which, though overruled in other respects by *Burke* v. *Jones*, stands unimpeached as to this point.

[*265] *The *Solicitor General*(b) and Mr. *Richards*, in support of the decree:—The court has been gradually restricting the doctrine of the older cases, that a declaration in a will for the payment of debts puts an end to the operation of the statute. *Burke* v. *Jones*(c) has finally decided the point; and the decree under appeal only follows out the same principle. A charge of debts upon personal estate will not operate in the same way as a charge upon real estate, although perhaps the intention may be the same as to both: and the rule is different as to the two descriptions of property; because, unless such an obligation be expressly imposed, the real estate remains unaffected, whereas upon the personalty the law always throws the liability, whether it be declared or not. A devise of leaseholds creates no new fund not otherwise available to the executors, and consequently can have no effect in letting in a claim that would be excluded by the statute; nor can a testator be permitted, according to his caprice, to vary or modify the rights of his creditors.

This is, in fact, a technical subject, and resolves itself into a mere question of assets at law. If the creditor proceeded for his debt by action, and the six years had run, the executor, by pleading the statute, could defeat the demand; and if, on the other hand, the remedy were not barred by lapse of time, it would be no defence to the executor, that the assets were in the hands of the trustees, nor would equity on that ground interpose to

[*266] *protect him; for the trustees would of course be his agents and responsible to him. So long as any personal estate remained unapplied, he could not plead *plene administravit*. If, therefore, a judgment were recovered, the plaintiff might immediately levy execution upon the term as assets. Suppose the will had specified a particular order to be followed in the payment,—that the book debts should be paid first, then the promissory notes, and so on,—that could not protect the executor at law, who is alone accountable for the property, and is bound to satisfy the debts, without reference to the directions of the testator. Whether the rights of the creditor are to

(a) Prec. in Chan. 385. (b) Sir W. Horne.

(c) 2 V. & B. 275. where the subject is elaborately discussed; some other cases are referred to in the notes to 3 P. W. 90, 6th edition. See also *Executors of Fergus* v. *Gore*, 1 Sch. & L. 107. *Stackhouse* v. *Barnston*, 10 Ves. 453. *Ex parte Roffey*, 19 Ves. 468. *Stanton* v. *Knight*, 1 Sim. 482. [*Pratt* v. *Adams*, 7 Paige, 642.]

be enforced in a court of law or of equity, as far as they apply to the same subject matter, they must, in either case, be co-extensive. On a bill for payment of the debts, the executors would be the only necessary parties, and it would be improper to join the trustees, who hold the property for the executors, and must account to them in the first instance. Here, the debtor has done nothing more than the law would have done for him. Suppose a testator says, "After payment of my debts, I give all my property equally among my children," can it be pretended for a moment that such an expression would preclude the executors from taking advantage of the statute to resist a claim against which time had run?

Upon examining the will attentively, no indication of intention as to the Tibberton estate can be collected from it. It does not appear that the testator intended to involve that estate to any greater extent than the law would do, if it were considered as personal; his object no doubt being, to make it liable in the same manner as his personal estate, but not to let in any demands against which time should have run. The authorities referred to on the other side are all cases of a charge *comprising real property, [*267] which, not being in its nature liable to simple contract debts, stands upon a totally distinct footing. There the court has held, that, a trust being established which equity will enforce, the principles applicable to the relation of trustee and *cestui que trust* must regulate the rights of the creditors. But that doctrine has never been applied to personal estate, and it would be highly dangerous to do so; since every case of a mere charge,—for instance, a bequest "subject to debts," which is the common form to be found in every will,—would then effectually destroy the beneficial operation of the statute. The language of Sir Thomas Plumer in *Burke* v. *Jones*, and of the present Master of the Rolls in *Hargreaves* v. *Michell*, implies that the doctrine is not to be extended to personal estate.

If the debt be gone otherwise, the notice relied on could not have the effect of reviving it; for it was given only for the purpose of informing the creditors generally, and could not amount to an acknowledgment of particular claims. *Brown* v. *Andrews* is of very doubtful authority; but it has no application, as the circumstances there were altogether different.

Mr. *Booth*, for the representative of the surviving trustee.

Sir E. Sugden, in reply.

June 30.—The Lord Chancellor(*a*):—The facts of this case, which is one of great importance both in respect of the principle it involves, and the consequences to which, in whatever way decided, it will lead are shortly these.

*A professioual gentleman of the name of Donovan, who was in- [*268] debted to certain persons in the sum of 260*l.*, made his will in

(*a*) Lord Brougham.

1815, and in 1816 he died. By that will he charged his debts,—not this particular debt by name, but all his debts,—upon his real estate, deeming it to be freehold, but which afterwards in point of fact turned out to be leasehold.

The intention, therefore, if any thing is to depend upon intention, is clear and manifest; it is plain he meant to have charged his debts even upon those estates which by law were not answerable for them. The debt in question was not barred by the statute at the period to which, according to all principle and authority, you are to refer, viz. the decease of the testator;[1] but it was so barred before any suit was commenced, the suit for its recovery being brought after six years had elapsed from the death of the debtor; and the question was, whether the words "after payment of all my debts," charging them upon the real estate,—whether those words changed the nature of the property and of the claim, (for that is one view,) converting what was before a debt into trust, and the creditor into a *cestui que trust*, and making the executor a trustee for the satisfaction of the demand; or whether, in another view, it was such a declaration of intention as amounted to an expression of the testator's will, that all his debts should be paid without regard to the statute of limitations. On either of those views, it was said, the words would be sufficient to take the debt out of the statute: for as it had not been barred at the time of the testator's decease, the nature of the debt, it was contended, and the situation of the creditor were so altered by that devise, that the statute of limitations would no longer run against it.

[*269] The importance of this question will be obvious, *when it is observed that most men's will contain a clause which affects their personal property just in the same way as is done here, and they therefore give exactly the same protection to their creditors, which this will does; with this difference, indeed, that here the intention is much more strongly marked, by reason of the mistake, the testator having clearly meant to keep alive his debts as against his freehold estate, and it being beyond dispute that the devise would have kept them alive, had a real estate existed. The consequence of such a doctrine would be, that this very ordinary expression in a will, which, where you seek only to affect the personal estate, is superfluous, would prevent the executor not from pleading the statute at law, for of that defence he may still avail himself, but from taking advantage of it against a suit seeking to charge him with assets in equity.

I have looked with care into all the cases in search of light upon the subject, and I have also applied for assistance to a very great and venerable living authority. I should first, however, state that there is another circumstance to which the learned judge in the court below adverted, namely, that,

[1] Vide *Ault* v. *Goodrich*, 4 Russ. 430. *Freake* v. *Cranefeldt*, 3 Myl. & Cr. 499. *Roosevelt* v. *Mark*, 6 Johns. Ch. Rep. 293.

after Mr. Donovans' death, his daughter, who had taken out administration to him, published an advertisement in a newspaper, requiring the creditors to come in and prove their debts. And I find in *Andrews* v. *Brown*, authority, such as it is, that would lead me to consider that circumstance as decisive. The book, however, is of no great repute; and the judge who decided the case, Lord Keeper Harcourt, though a respectable lawyer, is certainly not to be ranked with the Parkers, the Finches, and the Hardwickes. The case itself, besides contains other matters, which have since *been distinctly overruled, although upon the point in [*270] which it approaches the case at bar, there is no express decision contradicting it.

[Here his Lordship read the report in Precedents in Chancery, 385, and observed, that on two points, at least, the doctrine there laid down could not now be supported; for it was there said, that a direction in a will for payment of debts was sufficient to revive debts that had been previously barred; and that, in addition to an acknowledgment of the debt being still due, a promise to pay it was necessary, in order to frustrate a plea of the statute. His Lordship then continued]—I therefore hold the authority of *Andrews* v. *Brown* to be of very little weight. Nevertheless it is fitting to mark this circumstance of the advertisement, especially as it shows the belief of the personal representative that the testator's intention was to have all his debts paid. That is not immaterial. It is one of the lights in which a bequest for payment of debts, or a charge of debts upon real estate, may be regarded; one of the two grounds on which the plaintiff's argument rests, being that this indicates a desire on the part of the debtor, that his debts shall be paid, notwithstanding that by the lapse of time the remedy is gone. Assuming that to be the ground, the rule is now indisputably established in this court, however it may formerly have been doubted, that where there is a devise of lands for payment of debts, it will take those debts out of the statute; and, indeed, it was stated by Lord Mansfield in *Trueman* v. *Fenton*,(*a*) that it would be so held at law, if the case were properly brought before the court on the principle of giving effect to the intention. If intention be the ground, can it make any difference whether that intention be signified *by charging the debts upon free- [*271] hold estate or upon leasehold? If intention be the criterion, then you must take the mind of the intendor as it was circumstanced at the moment he did the act from which you seek to gather his intention. Mr. Donovan believed his estate to be freehold, and in that belief he charged his debts upon it; and can his mistake with respect to the tenure make any difference?

It was said, indeed, that if he had been aware the estate was leasehold, he would not have expressed the same intention, especially as he was a professional man, because he must have known that the law itself would charge

(*a*) Cowp. 548.

the debts upon it as personal estate. This may or may not be so; but it only brings us round to the other view of the subject. It is clear that intention to charge, that is, to keep alive his debts, is evidenced as distinctly as can be; and, in my view, it signifies not whether that intention was formed under mistake as to the nature of the property, or under a correct conception of its nature.

There is another consideration, not much referred to in the argument. Are we not bound, in construing a will, rather to presume in favor of that view which makes each clause operative than of that which leaves any clause wholly inoperative and nugatory? If the clause charging debts on the personal estate be not taken as meant to exempt them from the operation of the statute, what meaning can you possibly ascribe to it? The words are natural and sensible, if they be supposed to mean "I desire that the statute shall not run against my debts; that no advantage may be taken of the unconscientious plea which only bars the remedy, but does not put an end to the obligation." Unless you suppose this to be the object of the clause it fails of all effect; it is only saying, "let my debts be paid, as the law will take care to do whether I desire it or not—nay, in spite of my desir-
[*272] ing the contrary." I cannot, *without violence to probability, suppose that all men, professional as well as lay men, have continued for so long a time to put this clause into their wills, when they have no real property to dispose of, without any sense or purpose. That would be to reject the words as devoid of meaning; whereas the rule is, rather to adopt that construction which will give force and effect to every part of the instrument.

Coming, however, to that upon which chiefly the argument must be put,—that by a trust for payment of the debts you convert the creditor into a *cestui que trust*, and that, as between him and the trustee, time shall not run to create a bar,—it was said, and his honor seems to have been pressed by the argument, that a trust, made by a will or personal estate for payment of the testator's debts, is to be deemed an act wholly void and contrary to law. Now, I hold it to be one thing for an act to be merely nugatory; another, and a very different thing, for such act to be wholly illegal and void. A man may take in one way what, but for a particular provision, the law would have given him in another. I cannot say that such a provision is absolutely illegal, though it may be altogether unnecessary. When a person merely orders that to be done, which, if he had not so ordered, the law would have done for him he does not come under the description of giving a direction which is void as being contrary to law. Some directions may be imagined, which would be superfluous in respect of the nature of the debt; others, in respect of the fund on which the debt is charged. Of the former kind would be a proviso that specialty debt should be paid out of the freehold estate; of the latter, the clause before us is an example. Other directions, again, are superfluous, not in respect of the fund or the species of the debt, but the quality of
[*273] the debtor—the situation and *circumstances of the person making

the will. Thus, a trader within the bankrupt laws, and the 47 G. 3, would do what is superfluous, if he charged his simple contract debts upon his freehold estate; though with respect to a person not within those laws and that statute, it would be otherwise. In the case put, the act of the trader is superfluous: but it is not illegal, nor is it necessarily void. There is this difference, it is true,—that the remedy is somewhat different under the trust or charge created by such clauses, from that which would be given, if the matter were left merely to the operation of the law. But still what is done is superfluous; and yet it is clear that, if a bond debt were charged upon his freehold estate by the will of the obligor, although, in the ordinary case, satisfaction would be presumed after twenty years, all courts, whether of law or equity, would hold that, even after thirty or forty years had elapsed, the charge took it out of the operation of the rule, which has become by analogy a sort of judicial period of limitation. And so, I apprehend, if a trader charge upon his freehold estate debts against which the statute has run, though not at the date of his will, yet at the time of his decease, his debts will, notwithstanding both the statute and the superfluousness of the direction, be payable primarily out of his personal and then out of his real estate, just as if the six years had not expired, or the direction had been operative in other respects. That the superfluousness of a direction does not prevent it from keeping a debt out of the statute, which but for such direction would be barred, is clear from various cases. The intention to keep alive the debt is recognized by Lord Eldon, in *Ex parte Dewdney*,(*a*) as the main foundation of the principle. If it be contended, that the testator only means to charge his personal *estate with his just debts—in other words, such as shall be [*274] found legally due at the time of the demand, and therefore not such as would be legally barred—it may be answered, that precisely the same argument applies to a charge of debts upon real estate, which it is admitted will take them out of the statute. The court has gone upon the supposition either of a trust or of intention, taking that as equivalent to a declaration of the testator's will and mind that the statute shall not run. A great deal of doubt seems at one time to have existed as to the particular force and extent of the rule; and until the case of *Burke* v. *Jones* it should seem, from the current of authorities, and particularly from a case in the time of Lord Hardwicke,(*b*) that, though a debt was barred at the death of the testator, it would be revived, —not continued, but revived,—(a word implying that the debt was previously gone,) by a devise for payment of debts. The case of *Burke* v. *Jones*, however, which was decided by Sir Thomas Plumer after the fullest deliberation and after consulting with the other judges of the court, drew this broad distinction,—that, if the debt were actually barred at the period of the death of the testator, the charge of debts upon the real estate had not the effect of reviving it.

(*a*) 15 Ves. 497. (*b*) *Lacon* v. *Briggs*, 3 Atk. 105.

The only question is, whether there exists any difference between a charge upon the real, and a charge upon the personal estate. I have given my reasons for thinking that no such distinction can be maintained. My opinion is confirmed by what I find in the reporter's note to the case of *Jones* v. *Lord Strafford*;(a) from which it appears that the point now before the [*275] court *was, at the date of his book (1749, altogether unsettled; and all the inquiry I have been able to make, leads me to suppose that the point has never yet received a judicial decision.

Now, let us consider what will be the effect of this construction in the case of wills containing such a clause. The consequence will be that a man's debts, if he chooses so to charge them upon his personal estate, provided they be not barred at his decease, will be payable notwithstanding any length of time that may afterwards elapse. I know not that courts of equity, any more than courts of law, ought to lean against allowing a man to make such declarations of his intention to have his debts paid; and I have already stated, that, if this be not the meaning of the clause, I cannot see to what it applies, or upon what subject matter it can operate. If it be construed as a direction by the testator to pay the debts without regard to the running of the statute after his decease, the words are quite rational and intelligible, and at the same time expressive of an honest and conscientious intention; for a man ought to wish to discharge his debts notwithstanding the lapse of time, if he knows they are unpaid, and not avail himself of the argument which lapse of time may furnish *in dubio* in favor of their having been paid.

Upon these grounds I have felt myself bound to come to a decision contrary to that of his Honor. My opinion is, as I have already stated, fortified by the authority to which I alluded; nevertheless the point seems to be by no means free from doubt. Not that I feel any difficulty as to the effect of such a decision in future; because then every man will know, when he frames his will, that the clause is introduced with a view to prevent the operation [*276] of the statute. But it was with respect to *wills already made on account of the retrospective and intermediate effect of such a construction, before it can become generally known, that I felt so much anxiety and doubt as induced me to seek the lights of living as well as of departed learning. And although the opinion which I had formed is thus confirmed, yet, looking to the importance of the question, and the doubt in which it may to some still appear to be involved, it would be a satisfaction to have the whole subject reconsidered elsewhere. If the estate can conveniently bear the expense, I shall ensure the earliest consideration of the case, and the best assistance which equity or law can afford, to the final settlement of what appears to me a principle of great moment in the law, as administered by this court.[1]

(a) 3 P. W. 79. The note referred to is by Mr. Peere Williams, p. 89. (A).

[1] Reversed in Dom. Proc. 4 Clarke & Fin. 382. And see, *Freake* v. *Cranefeldt*, 3. Myl. & Cr. 499. *Evans* v. *Tweedy*, 1 Beav. 55. *Crallan* v. *Oulton*, 3 Beav. 1. 3 Myl. & Cr. 502. n. 1. 1 Keen, 211, n. (B).

*Bowsher v. Watkins. [*277]

Rolls.—1830; February 9, 10, 16.

Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved.

John Bowsher and Watkins carried on business in partnership; and, at a yearly account settled on the 30th of April, 1822, Bowsher's share of the joint stock in trade of the partnership was ascertained to amount to 42,948*l.* 3*s.* 3*d.* On the 21st of June following he died, having by his will disposed of the residue of his estate in favor of the plaintiffs, and appointed Thomas Ormerode and Mary Bowsher his executor and executrix. They proved the will. Sometime afterwards, they entered into an arrangement with Watkins for converting the property of the partnership into money, and bringing the business to a close; and they appointed one Kirby to act on their behalf with Watkins in winding up the concern. In 1823, Kirby and Watkins entered into partnership.

The bill was filed by the residuary legatees of John Bowsher, against Watkins, Kirby, and the executor and executrix. It alleged that Watkins, after the death of the testator, employed stock and effects, belonging to the late partnership, in a business which had been carried on for his own profit; that he and Kirby, after they entered into partnership, carried on their business with property of the late partnership of Bowsher and Watkins, which remained unsold; that the plaintiffs had applied to Thomas Ormerode and Mary Bowsher to appoint some other person in Kirby's stead to get in the assets, or to take proper steps to compel Watkins and Kirby to account; that they had not complied with these requests, but had wholly neglected to take any steps to compel Watkins and Kirby to account: and "that by such neglect they countenanced and assisted Watkins *and Kirby in [*278] misapplying the assets." The prayer was, among other things, that an account might be taken of the partnership dealings from the last yearly settlement and of the moneys received on behalf of the partnership by Watkins, or by Watkins and Kirby.

Mary Bowsher and Kirby having died, the suit was revived against their personal representatives.

Watkins, by his answer, admitted, that, after the testator's death, he employed some effects belonging to the partnership, in building certain ships; but those ships were afterwards sold, and the proceeds were paid to a banker, to the joint account of him and the executors, and were duly applied as partnership assets. He denied that he and Kirby had made use of any part of the property of the late partnership in carrying on their business; and he did not believe that the plaintiffs had made to the executor and executrix the applications stated in the bill, or that the executor and executrix had refused to comply therewith.

Ormerode stated, that Kirby had been selected to assist in winding up the concern, because he had been long the clerk of Bowsher and Watkins, and had enjoyed the unlimited confidence of the testator. He did not recollect or believe that any application had been made to him or the executrix to appoint some other person in Kirby's stead, or to compel Kirby and Watkins to account: he was not aware, till after the filing of the bill, that Kirby and Watkins had applied any part of the stock of the late partnership in their trade, except a few articles which had been valued to them; and though he had no notion, when Kirby was appointed, that that gentleman was afterwards to enter into partnership with Watkins, he considered his agency to have [*279] been highly *advantageous to the estate of the testator. He denied that he had, by any negligence or otherwise, countenanced or assisted Watkins and Kirby, or either of them, in wasting the assets; and he did not believe that the assets had been wasted or misapplied.

There was no proof that the executor and executrix had acted in collusion with Watkins and Kirby, or that any applications had been made to them to compel Watkins and Kirby to account. The executor and executrix had not been called upon to file a bill against Watkins and Kirby, or either of them.

Mr *Pepys*, Mr. *Bickersteth* and Mr. *Wright*, for the plaintiffs.

Mr. *Tinney* and Mr. *Piggott*, for the personal relatives of the testator.

Mr. *Pemberton* and Mr. *A. Crompton*, for Watkins:—On behalf of Watkins an objection was taken to the frame of the suit. Watkins, it was said, was merely a debtor to the estate of the testator;[1] and the rule is, that a debtor cannot be made a defendant to a bill filed by a residuary legatee; *Utterson* v. *Mair*,(a) *Beckely* v. *Dorrington*.(b) The exception is, where there is collusion between the executor and the debtor; but collusion must be charged and proved. Here there is not so much as a charge of collusion. There is, indeed, an allegation that "the executors countenance and assist Watkins and Kirby in misapplying the assets;" but it is expressly stated, that the mode, in which this supposed countenance and as- [*280] sistance had been given, was by *neglecting to compel them to account; the charge is therefore a charge of negligence only, which will not bring the case within the exception. Neither negligence nor collusion is proved. No application was ever made to the executor or executrix to file a bill against Watkins. Can an instance be produced, in which a legatee has been allowed to sue a debtor to the estate, when he had never called upon the personal representative to institute proceedings?

If Watkins is to litigate any question between him and the estate of the

(a) 2 Ves. jun. 95. (b) Cited in 6 Ves. 749.

[1] It is a general rule that a person having a claim on the assets of a testator, cannot in suing the executor, make a debtor of the estate a party to the suit; but the rule admits of exceptions. *Lancaster* v. *Evors*, 4 Beav. 158.

testator, why is he to be called on to litigate it with any person except the executors? In a suit like the present, it is of great importance to the defendant, who the persons are with whom he is to contend as plaintiffs. Hitherto he has dealt with the executors: the greater part of the accounts sought by this bill have been arranged in the fairest manner to his satisfaction and theirs; had they instituted the suit, they would not have ventured to state such a case as is now brought forward; or if they had, an easy and complete answer to it would have been at hand. Is his situation to be altered for the worse, by allowing the residuary legatees to take upon themselves the functions of the executor?

On the other hand, it was said, in support of the bill, that there were special circumstances in the case which took it out of the general rule. Watkins was not a mere debtor to the estate; he was the surviving partner of a partnership in which the testator held the largest share; and, as such, he necessarily had part of the assets in his hands. The amount of the demand against him in respect of these assets could not be ascertained in an action at law; it must necessarily be investigated in a court of equity; so that he suffered no hardship from being made a defendant; and there would be extreme *inconvenience in having one suit by the [*281] legatees against the executors, and another in the name of the executors against Watkins. In *Newland* v. *Champion*,(a) it was held that the creditor had a right to make the surviving partner of his testator a defendant to a bill for an account. "I take the case of partnership," said Lord Hardwicke, "to be different; and though there was no suggestion of collusion, yet I do not think the bill would have been demurable to, as has been insisted on. Many bills are brought in this court, not only making the representatives parties, but also all other persons who have possessed the specific assets; and there are many instances where the surviving partner is made a party, that they may have an account of the personal estate entire." The same principle was followed in *Doran* v. *Simpson*, (b) and *Alsager* v. *Rowley*.(c) In *Gedge* v. *Traill*,(d) a demurrer was overruled

(a) 1 Ves. sen. 106. (b) 4 Ves. 651. (c) 6 Ves. 748

(d) GEDGE v. TRAILL.

1823; November 3.

A bill, filed by a creditor of a testator against the executor, and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to retain assets which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator; but it did not charge in express terms that the executor was colluding with his co-partners: the creditor was held to have, under such circumstances, a right to sue all the partners; and a demurrer by the partners, other than the executor, was overruled.

A testator died in India, having appointed certain executors in that country, and other executors in England. The defendant, Traill, a partner in the house of Paxton & Co., was the only person who proved the will in England; and the executors in India had remitted to him assets to a considerable amount.

The original bill was filed against Traill by a creditor of the testator, for payment of a debt. Afterwards, all the partners in the house of Paxton & Co. were made defendants by amendment; and it was alleged that [illegible] had been remitted either to Traill or to Paxton & C

[*282] to a bill filed by a *creditor against an executor and his partners, who had assets in their hands. Here Watkins, upon the death of the testator, came into the possession of assets, and had been dealing with those assets. The possession of the assets rendered him accountable to a person beneficially interested in the estate.

[*283] *THE MASTER OF THE ROLLS was of opinion that the plaintiff had a right to sustain the bill against the surviving partner.[1]

that Paxton & Co. claimed a large sum as due to them from the testator; and that the defendants pretended that Paxton & Co. were entitled to retain the assets in discharge of their own claim.

There was no express charge that Traill was colluding with his co-partners.

The partners in the house of Paxton & Co., other than Traill, put in a general demurrer to the bill for want of equity.

Mr. *Cockerell* in support of the demurrer.

There is no privity between the demurring defendants and the plaintiff; they are accountable to the executor, and the executor is accountable to the plaintiff. The possession of assets constitutes Paxton & Co. a debtor to the estate of the testator; but a creditor has no right to call them to an account, or to enforce payment of that debt, unless the executor be insolvent or acting in collusion with them, *Alsager* v. *Rowley* (6 Ves. 748.) In the present case, neither collusion nor insolvency is charged.

Mr. *Teed*, contra.

It is immaterial whether it be alleged in words, that Traill colludes with the other defendants, if facts are stated on the face of the bill, which show that he and they are acting in concert. Such concert follows necessarily from the fact of his being in partnership with them. It is the partnership which retains the assets; this retainer is the joint act of Traill and his co-partners; and any person, who has an interest in the estate, must be entitled to sue him and them jointly. Such a state of things constitutes an exception from the general rule, that a debtor to the estate cannot be made a defendant to a bill by a creditor.

THE VICE CHANCELLOR (Sir John Leach) stated, that, in substance, it was collusion on the part of the executor, if a stranger retained assets with his consent and approbation; that this bill alleged that all the partners (of whom Traill was one) retained the sums remitted, and claimed to be entitled to retain them; and that those circumstances amounted to collusion, and brought the case within the exception from the general rule.

The demurrer was overruled.

[1] In *Holland* v. *Prior*, 1 Myl. & K. 237, 244, Lord Brougham appears to have adopted the decisions in *Bowsher* v. *Watkins* and *Gedge* v. *Traill*, without question, or qualification; but in *Davies* v. *Davies*, 2 Keen, 539, Lord Langdale, M. R. speaking of *Bowsher* v. *Watkins*, observed: "I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case, a bill might be filed against an executor and surviving partner of the testator, without charging and proving fraud or collusion." In a suit by a joint creditor against the representatives of a deceased partner, and the surviving partner, the latter is properly joined as a defendant, being interested to contest the demand of the plaintiff and of all joint creditors, but the remedy against him is altogether at law. *Wilkinson* v. *Henderson*, 1 Myl. & K. 582. A person having a claim against a testator's estate prevailed upon the executors to hand over to him part of the testator's assets, under circumstances from which he must have known that in so doing, the executors were acting hastily, improvidently, and against their duty as executors: it was held that such person was a proper party to a suit instituted by a legatee against the executors for the administration of the estate, although the bill contained no charge of collusion or insolvency. *Consett* v. *Bell*, 1 Yo. & Coll. C. C. 569.

The decree directed an account of the partnership dealings and transactions of Bowsher and Watkins, from the 30th of April, 1822; an account of the property and effects of the partnership at the time of the testator's death, and of the amount of his capital engaged therein; and an account of the sums received by Kirby, and retained by him on account of his services and expenses; with an inquiry whether any thing was due to or from his estate in respect thereof.

Reg. Lib. 1829, A. 2908.

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*COLLINS *v.* ARCHER. [*284]

ROLLS.—1830; February 11, 23.

Purchase for valuable consideration without notice is not available as a defence against a plaintiff who relies upon a legal title.

A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B., who, at the time, had no notice of the prior charge: the annuity fell into arrear in 1816; and, in 1817, the rector took the benefit of the insolvent act: B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814: and no step was taken to enforce payment till 1827, when A. filed against him a bill for an account; in answer to which, B. insisted that he was a purchaser for valuable consideration without notice: Held,

That that defence was of no avail against the legal title of the plaintiff;

And that the defendant ought to account for the tithes for the six years before the filing of the bill.

HENRY GODDARD, being rector of the rectory and parish church of Castle Eaton, executed an indenture bearing date the 21st of January, 1811, by which he granted to Collins, in consideration of 4000*l.*, an annuity of 550*l.* for the life of him, Goddard: and, for the more effectually securing the annuity, he thereby granted and demised the said rectory of Castle Eaton and the vicarge of Deverill Longbridge, therein mentioned, with the messuages and tenements, and all the tithes, issues, and profits belonging thereto respectively, unto John Pern Tinney, his executors, administrators, and assigns, for the term of ninety-nine years, if he (Goddard) should so long continue the incumbent of the rectory and vicarage, without impeachment of waste, upon certain trusts for securing the payment of the annuity. As a further security, judgment for 8000*l.* was entered up against Collins; on which, as often as the annuity should be in arrear for the space of forty days, Collins was to be at liberty to issue one or more writ or writs of *levari facias de bonis ecclesiasticis*, for the purpose of sequestering the rectory and vicarage.

The annuity being in arrear to the amount of 693*l.* 10*s.*, Collins, in May, 1815, procured a writ of *sequestration of the rectory for [*285] the sum of 8000*l.* and costs, indorsed to levy 693*l.* 10*s.*, besides costs and expenses; and upon this writ letters of sequestration were granted

to Collins. In 1817, Goddard took the benefit of the insolvent act; and, under an order of the court for the relief of insolvent debtors, the bishop of the diocese, on the 1st of December, 1817, granted to Collins letters of sequestration of the rectory, so far as it could or might be subject to such sequestration.

On the 6th of December, 1817, the annuity being in arrear to the amount of 1000*l.* and upwards, a writ of sequestration was issued, endorsed for 7420*l.* 18*s.* 1*d.*, besides costs and expenses, upon which letters of sequestration bearing date the 6th of December, 1817, were granted to Collins.

The bill was filed on the 3d of April, 1827, by Collins and John Pern Tinney his trustee, against Archer, who, it was alleged, had, for six years immediately preceding, occupied certain lands within the parish, and had not, during that time, set out the tithes of the tithable matters which had grown or arisen upon them. The prayer was that he might account for the value of the tithes which had been so subtracted.

Archer, by his answer, stated, that, Goddard being or pretending to be seised of the rectory of the parish of Castle Eaton as rector thereof, and, as such, entitled to all tithes within the same, by indenture of covenant, dated the 2d of November, 1814, in consideration of 1250*l.* then paid to him by Archer, and of the further sum of 1500*l.*, to be paid to him by Archer, his executors or administrators, on or before the 25th of December then next, he (Goddard) did covenant with Archer, his executors, administrators, and assigns, that he would, on or before the [*286] *25th of December then next, make a good and effectual demise to Archer, his executors, administrators, and assigns, for a term of ninety-nine years, determinable with Goddard's life or incumbency, of all the glebe lands of the rectory, and also of all the tithes of certain lands therein described, which were then in the tenure or occupation of Archer; and that Goddard did further covenant to execute, as an indemnity against the forfeiture, avoidance, resignation, or sequestration of the lands, tithes, and hereditaments during his life, a bond in the penalty of 2750*l.*, and a warrant of attorney to enter up judgment for the same sum:—that the 1500*l.* was duly paid to Goddard, who, accordingly, by indenture dated the 24th of December, 1814, demised to Archer, among other things, the tithes of certain lands therein mentioned, including the lands, in respect of which tithes were claimed by the bill, for the term of ninety-nine years, if he (Goddard) should so long live, with the usual covenants against incumbrances, and for title and quiet enjoyment;—that, by virtue of the said indenture, he (Archer) openly and publicly entered into possession of the tithable lands and tithes thereby demised, and had ever since from year to year collected or received and retained the tithes;—that it was from 1814 well known throughout the parish, and to the plaintiffs, that he, the defendant, had acquired the rector's interest in the tithes of the lands in his own occupation; and that the plaintiff had not made any demand upon him in respect of tithes, till shortly before the filing of the bill.

The defendant further stated, that, at the time of the respective payments of the sums of 1250*l.* and 1500*l.*, he had no information, knowledge, belief, or notice of any prior incumbrance or claim by or on the part of Collins, or any other person, to the rectory, tithes, and premises *so demised [*287] and granted, or any part of the same; and he submitted "that he was a *bona fide* purchaser for valuable consideration, and without notice of the grant of the annuity to Collins, or any prior or other incumbrance on the said rectory of Castle Eaton, than the demise to himself;" and he claimed "to have the full benefit of the several matters so stated by him, in like manner as if he had pleaded them in bar to the discovery and account sought by the bill."

Goddard died after the institution of the suit.

It was stated by one of the witnesses for the defendant, that Tinney, from Lady-day, 1816, collected and received the tithes, or a compensation in lieu of them, from all the occupiers within the parish, except the defendant Archer, and that, in May, 1816, he claimed the tithes of Archer's lands, "as the prior assignee or sequestrator under Goddard."

The bill did not allege that tithes had been claimed from Archer at any particular time.

Mr. *Tinney* and Mr. *Rolfe*, for the plaintiffs:—The 13 Eliz. c. 20, enacts, "that all chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." That act was repealed by the 43 G. 3, c. 84, s. 10, but was partially revived in 1817. The deed of 1811, under which the plaintiffs claim, having been executed while the 43 G. 3, c. 84, was in force, is a valid instrument, and passed the legal estate in the rectory to the trustee Tinney. *Doe d. Cates* v. *Somerville.*(*a*) From [*288] the time when that deed was executed, the legal title to demand and receive the tithes was in Tinney as a trustee for Collins; and the defendant, who, in the meantime, has not set out his tithes, or made payment in lieu of them to any person, must now account to the plaintiffs.

The defence set up by the answer is, that Archer, under a deed executed in December, 1814, is a purchaser of the tithes in question for valuable consideration, without notice of the title of the plaintiffs. Purchase for valuable consideration, without notice, will protect the purchaser against an equitable title, but is not available against the legal title. In *Williams* v. *Lambe*,(*b*) which was the case of a bill by a widow for dower, Lord Thurlow said, "the only question was, whether a plea of purchase without notice would lie against a bill to set out dower: that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim;" and he therefore overruled the plea. This passage is

(*a*) 6 Barn. & Cress. 126.

(*b*) 3 Bro. C. C. 264.

referred to by Lord Manners in *Medlicott* v. *O'Donnell*,(a) and the soundness of the doctrine is not questioned. The effect of *Wilkes* v. *Bodington*(b) is, that a defendant, in order to avail himself of the plea of being a purchaser without notice, must have either the legal estate, or a better right than the plaintiff to call for the outstanding estate; and, consequently, that that plea can never be made use of against a plaintiff who relies on a legal title.

If a party sought to enforce his legal title in a court of law, the defence of purchase for valuable consideration could not be set up. Why, then, [*289] should it be *available in a court of equity, when that court is not acting on an equitable title, or giving equitable relief, but is proceeding on a title purely legal, and exercising a concurrent jurisdiction with courts of law, for the purpose of giving the same relief as would be afforded by them, but of giving it by more effectual or convenient means.(c) Here the plaintiffs stand upon their legal title to the tithes; they might recover [*290] them by *an action, against which the title of purchase for valuable consideration without notice would be no defence; and they apply to a court of equity (the subject being one in which a court of equity has concurrent jurisdiction,) because the account, which is necessary to complete relief, can be obtained more conveniently here than by proceeding at law.

Mr. *Pemberton* and Mr. *Boileau*, contra:—A court of equity never interposes against a purchaser for valuable consideration, and without notice. If the person who claims against him has a legal title, that legal title may be enforced by legal remedies; but a court of equity will not act in aid of it.

(a) 1 Ball & Beatty, 156. (b) 2 Vernon, 599.

(c) Lord Redesdale says, (Treatise on Pleading, 4th ed. p. 288,) "If a defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title, a court of equity will not, in general, compel him to make any discovery which may affect his own title.(*) Thus, if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bona fide* for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy.(†)

At page 274 of the same treatise, Lord Redesdale expounds the doctrine on this subject, and makes no mention of any exception in favor of a plaintiff, who comes into equity upon a legal title. "Supposing," says he, "a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side."

Sir E. Sugden, in his Treatise on the Law of Vendors, 6th edition, 741—742, cites *Burlase* v. *Cook*, 2 Freem. 24; *Rogers* v. *Seale*, 2 Freem. 84; *Parker* v. *Blythmore*, 2 Eq. Ca. Abr. 79, pl. 1; *Williams* v. *Lambe*, 3 Bro. C. C. 264; and *Jerrard* v. *Saunders*, 2 Ves. jun. 454; and concludes with the following observations:—"To argue from principle, it seems clear that the plea (of purchase for valuable consideration without notice) is a protection against a legal as well as an equitable claim; and as the authorities in favor of that doctrine certainly preponderate, we may, perhaps, venture to assert that it will protect against both."

See also Mr. Belt's note on *Williams* v. *Lambe*, and *Gait Osbaldeston*, 5 Mad. 428, and 1 Russell, 507.

(*) 2 Ves. jun. 458; 3 Atk. 302.

[†] *Perratt* v. *Ballard*, 2 Cas. Chan. 72; *Heyman* v. *Gomeldon*, Finch R. 34; *Abery* v. *Williams*, 1 Vern. 27.

If a plaintiff files a bill for a discovery in aid of an action at law, the defendand may plead that he is a purchaser for valuable consideration without notice. The *dictum* in *Williams* v. *Lambe* is not in accordance with the general doctrine of the court; and it could scarcely have been necessary in that case to consider the point; for it is not easy to conceive how purchase for valuable consideration without notice could be pleaded in bar to a bill to set out dower. Every man, who buys, is bound to ascertain, whether the parties, from whom he buys, had wives entitled to dower.

The title of Collins, as sequestrator, is inconsistent with the title of Tinney as trustee of the term; and it is not here that they are to seek their remedy in respect of the judgment of which they claim the benefit, and writs of sequestration which they have issued. The bill can be sustained only upon the demise; and the title of the plaintiffs cannot be carried higher than that of mortgagees of the rectory having a right to enter into the receipt and income of the tithes. Now, the annuity *was in arrear in 1816; and [*291] though they were aware that the defendant claimed the tithes of his lands under the deed of 1814, they took no steps against him. The bill does not allege that they called upon him at any particular time to account to them. As they have permitted Archer to retain the tithes, he must be in the same situation as if he had paid them to another person claiming under the grant of 1814. The plaintiffs are to be considered as, at the most, only mortgagees who have not taken possession; and it is well known that such a mortgagee is not entitled to an account of by gone rents. The retainer of the tithes by Archer under the grant from Goddard, is equivalent to payment to Goddard: the plaintiffs could not have called upon Goddard to account for what he had received; how can they have a larger remedy against the defendant, who must be admitted to be entitled, under the deeds of 1814, to all Goddard's rights? They cannot have an account from any earlier period than the filing of the bill.

Mr. *Tinney*, in reply:—The defendant is in the situation of an occupier who has not paid tithes to any body. The plaintiffs, under their demise, were entitled to the tithes; and it was the duty of the defendant to have set them out; at law he would be answerable for the value of the tithes for the six preceding years; and as this court has concurrent jurisdiction in the matter, the relief granted here must be as extensive as the remedy would be at law.

If the defence of purchase for valuable consideration without notice could be set up against a legal title, recourse would be had to it in almost every suit where the right to tithes is in question. For instance, where a vicar files a bill against an impropriate rector who has *long been in [*292] the receipt of the tithes which the vicar claims, the defendant might say that he was a purchaser for valuable consideration without notice, and so protect himself from giving discovery, and ward off the relief.

February 23.—THE MASTER OF THE ROLLS:—The defendant states, by his answer, that he is a purchaser for valuable consideration, without notice of the plaintiff's prior charge. Following the case of *Williams* v. *Lambe*,(a) and the general principle of a court of equity, I am of opinion that that defence is of no avail against the legal title.[1]

Another question is from what time the account is to be taken against the defendant? In these cases a court of law and a court of equity have concurrent jurisdiction; and inasmuch as, in a court of law, the plaintiff could recover the arrears for six years before the commencement of the action, the defendant here must account for the tithes for the six years previous to the filing of the bill.[2]

[*293] *HOGGART *v.* SCOTT.[3]

ROLLS.—1830; March 8, 9.

The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing he can show good title, although he had not such title at the time of the contract: but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait, till the plaintiff could acquire a good title.

A TESTATOR, Bush, had devised freehold estates upon trust, to sell: the survivor of the trustees died intestate as to the trust estate, which became vested in an infant heir; and the plaintiffs Abbot and Smith, who were the personal representatives of the survivor of the trustees, and had acted on the notion that the execution of the trusts of Bush's will had devolved upon them, entered into an agreement, in November, 1825, to sell part of the property to the defendant. In February, 1826, the misapprehension, under which they had acted, was discovered; and the purchaser was apprised that the vendors would take the necessary steps for getting in the legal estate which was outstanding in the infant heir. With that view, a petition was presented, in June, 1826, under the 6 Geo. 4, c. 74; and, on the 23d of that month, the usual order of reference was made. Difficulties occurred in the prosecution of the reference: in September, 1826, and subsequently, the solicitor of the purchaser repeatedly called upon the plaintiffs either to complete the title or to return the deposit; and their solicitor communicated to him the proceedings which were going on. On the 26th of May, 1827, the master made his report; which was shortly afterwards confirmed; and, on the 30th June, 1827,

(a) 3 Bro. C. C. 264.

[1] Mr. J. Story, (1 Eq. Juris. §. 410. n. 9, §. 631. & n. ibid,) considers that the point is not definitively settled. See the reporter's, note, ante, 289.

[2] Vide *Monypenny* v. *Bristow*, 2 Russ. & M. 117. 125. *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 113, Am. Ch. Dig. Limitations, statute of, I.

[3] S. C. Taml. 500.

a further abstract was delivered. A suit was then instituted to have new trustees appointed for the execution of the trust of Bush's will: in that suit the plaintiffs, Abbot and Smith, were appointed trustees; and, under an order of the court, directing the infant heir to convey, the estate, in December, 1827, became vested in them.

*In the mean time the purchaser, in May, 1827, commenced an [*294] action for the recovery of his deposit, in which he obtained a verdict. In October, 1827, the bill was filed for specific performance of the contract.

Mr. *Bickersteth* and Mr. *Mac Arthur*, for the plaintiff.

Mr. *Pemberton* and Mr. *Phillimore* for the defendant.

On behalf of the defendant, it was contended, that the court would not enforce the performance of a contract which the plaintiffs had no authority to make. At the time of the sale the plaintiffs were mere strangers to the property; they had no estate, legal or equitable, in the premises, nor power over them. If they have since acquired a right to dispose of them, that subsequently acquired authority will not sanction an act done before the authority existed. A sale, made by them, at a time when they were not authorized to sell, will not bind their *cestuis que trust*. There are cases in which a vendor, who had not a perfect title at the commencement of the suit, has obtained a decree for specific performance, if the defect has been supplied before the hearing of the cause. *Wynn* v. *Morgan*.(a) But here the objection is not merely to the title, but to the plaintiffs, as persons who, at the time when the agreement was signed, were not capable of entering into a binding contract.

On the other hand it was argued, on behalf of the plaintiffs, that, as the property was now vested in them, and they could make a complete title, the court would compel the performance of the contract. Nothing would be more unreasonable than that the purchaser should *escape from [*295] his agreement, after the vendors had been at the expense, with his knowledge, and with his acquiescence, of the various proceedings which were necessary in order to transfer to them the estate from the infant heir.

The Master of the Rolls:—The bill is filed for the specific performance of a contract for the sale of a freehold estate.

The plaintiffs were the executors of the surviving trustee, to whom the power of sale was given by the will of a testator; and considering that the power had devolved upon them, they entered into the contract with the defendant. The surviving trustee left an infant heir: and, the misapprehension of the plaintiffs being discovered, a petition was presented, upon which, with the privity of the defendant, the usual order was made, referring it to the master to inquire whether the heir was an infant trustee within the meaning of the act. The master having reported in the affirmative, a bill was filed for the

(a) 7 Ves. 202.

appointment of new trustees, in the place of the infant heir; and in that suit the plaintiffs were appointed the new trustees: but before the decree was obtained in it, the present bill was filed.

An objection was taken at the hearing, that the plaintiffs, at the time of the contract, had no power of sale, and that the contract, therefore, could not be enforced.

The objection must be overruled. The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title;[1] and he was not bound to wait until they had acquired [*296] a title; *but, he not having taken that course, it is enough that at the hearing a good title can be made.[2]

His Honor decreed a specific performance.

Dalby v. Pullen.

1830; March 16, 18.

Under a decree for sale, made in a suit for the administration of a testator's assets, A. became, in 1813, the purchaser of certain lots, and, after a long resistance to the title, was in 1824 compelled to pay the purchase money into court, and was let into possession; two years afterwards, and before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, and which, there was reason to believe, had been long before known to the solicitor of the plaintiff, he obtained a reference back to the master: the master reported against the title; to the report exceptions were taken, and before the exceptions came on to be heard, the vendors had cured the defect: Held,

That the purchaser had a right to be discharged from his contract, and that a further reference of title ought not to be directed:

That, in a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit.

John Carter, by his will, dated in February, 1778, devised and bequeathed the residue of his real and personal estates to his brother Nicholas Carter,

[1] Vide *Watson* v. *Reid*, ante, 236, 237, and note 1. In the report of this case in Tamlyn, p. 504, the Master of the Rolls is reported to have said:—"Those vendors having acquired the legal authority before the hearing of this suit, there is no objection to a decree for specific performance,—the defendant might have retired from the contract on the discovery of the defect in the vendor's title; but he did not do so; he acquiesced in those proceedings which were necessary to clothe the plaintiffs with the legal title, and there is no evidence that reasonable diligence was not used in the master's office." And see *Nodine* v. *Greenfield*, 7 Paige, 545, 549.

[2] Vide *The Reformed Dutch Church* v. *Mott*, 7 Paige, 77. *Baldwin* v. *Salter*, 8 Paige, 474. 2 Story's Eq. Juris § 777. A specific performance of a contract for sale of an estate in fee simple was decreed in favor of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase, as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder, to make a good *prima facie* title to the fee simple at the hearing. *Salisbury* v. *Hatcher*, 2 Yo. & Coll. C. C. 54. See further, *Bennett* v. *Rees*, 1 Keen, 405, 409, n. 1, 2.

and died in September, 1781, when Nicholas entered into the receipt of the rents and profits of all the lands and tenements of which John was in possession at the time of his death. In March, 1784, Nicholas Carter made his will, by which, after devising his freehold, copyhold, and leasehold lands, tenements, and hereditaments to his wife for life, he directed, that, upon her death, they should be sold, and that the moneys to arise by such sale should be divided equally between and among his seven daughters. He died in the same year, leaving his seven daughters him surviving: his widow immediately entered into the receipt of the rents and profits of all the lands of which he had been in possession at his decease, and continued in such receipt during the remainder of her life. Her death happened in 1811. Shortly afterwards, a suit was instituted for the purpose of having the *will established, and the trusts of it carried into execution; and, on [*297] the 13th of March, 1813, a decree was made, establishing the will, and directing the estates to be sold. They were accordingly sold in thirty-two lots, before the end of the year, for sums amounting to considerably more than 30,000*l.*

With a view to simplify the title, which had been embarrassed by various incumbrances made by the daughters and their husbands, deeds were executed in February, and May, 1816, by which the estates were vested in trustees, upon trust to convey to the several purchasers; and fines with proclamations were levied by six of the daughters: the seventh was prevented by her absence abroad from concurring in the fines.

Sir Robert Wigram had been reported the purchaser of lots 1, 2, 8, and 9, at the respective prices of 710*l.*, 1670*l.*, 1875*l.*, and 950*l.* On the abstract delivered to him it appeared, that part of the property which he had bought was derived from John Carter, and that it had been conveyed to him subsequently to the date of his will, so that it would not pass to Nicholas as his devisee. Sir Robert Wigram, therefore, required proof that Nicholas was the heir of John. In November, 1816, the solicitor of the plaintiffs stated in reply, that he had searched for, but had not found, the registry of the marriage of George Carter, the father of the devisors, John and Nicholas; that it appeared by the entries of baptism of John and Nicholas, that the former was baptized on the 17th of July, 1726, and the latter on the 30th of January, 1731; and that on the death of John, Nicholas had been admitted as his heir, to some copyholds which John had not surrendered to the use of his will. This statement was considered satisfactory; objections, however, were made to the title on other grounds: these were answered; and finally the master reported that a good title was made to all the lots, [*298] except lot 2.

Sir Robert Wigram took exceptions to the report; the exceptions were overruled; and on the 4th of December, 1824, an order was made discharging him from the purchase of lot 2, and ordering the purchase money of the

three other lots to be paid into court. The money was paid accordingly, and Sir Robert Wigram was let into possession.

In November, 1826, before any conveyance to him was executed, Sir Robert Wigram was informed by persons who were not parties to the suit, that Nicholas Carter was not the heir of John; for that Nicholas had an elder brother, George, who died in the lifetime of John, the testator, and left a son John, who, as heir at law, was entitled to the estates which John, the testator had purchased after the date of his will. Sir Robert Wigram immediately communicated this information to his solicitor, who caused a search to be made in the registers of the parish church of St. Giles within Cripplegate, and there found entries of the baptisms of three sons and three daughters of George Carter of the said parish, butcher, and Elizabeth his wife. The three sons were named John, George, and Nicholas; John was born on the 24th of June, 1726, and baptized on the 17th of July, 1726; George was born on the 21st of August, 1727, and baptized on the 3d of September, 1727; and Nicholas was born on the 5th of January, 1731, and baptized on the 30th of January, 1731. The register of the same parish contained an entry of a marriage solemnized on the 29th of December, 1755, between George Carter, bachelor, and Sarah Carter, spinster, both described as resident in the said parish; and entries of the baptisms of two sons of George Carter of the said parish, butcher, and Sarah, his [*299] wife, namely, George, born on the *27th of July, 1757, and baptized on the 14th of August, in the same year, and John, born on the 11th of May, 1759, and baptized on the 30th of the same month of May. In the register of burials of the same parish was an entry of the burial of George Carter, a child, on the 20th of August, 1758. John Carter, the surviving son, was the person who now claimed, as heir of his uncle John Carter the testator, the lands purchased after the date of his will.

In this state of circumstances, on the 15th of January, 1827, an order was made, on the application of the purchaser, referring back the title to the master; he reported against the title; and to his report exceptions were taken. While the exceptions were pending, an order was made in the cause, by which it was referred to the master to inquire whether it would be for the benefit of all parties, that a sum of 1000*l.* should be paid to John Carter, in consideration of his releasing and conveying his claim and interest. The master reported in the affirmative; the money was paid to John Carter; and in March, 1829, he executed a release and conveyance of all his interest.

Shortly afterwards the exceptions were argued and over-ruled, and as soon as they were disposed of, two motions were made;—one on behalf of the purchaser, to be discharged from his purchase; the other on behalf of the plaintiffs, that it might he referred back to the master to review his report, and inquire whether the vendors could now show a good title.

The affidavits sworn in support of the purchaser's present application, and

of his application in January, 1827, when the last order of reference was made, disclosed the facts which are stated above. It appeared further by the affidavit of one Thomas Price, the brother-in-law of John Carter the claimant, that, about the 4th of *December, 1826, Thomas Dalby, one [*300] of the plaintiffs, in a conversation concerning John Carter's claim, informed him, Price, that, about ten years before, he had complained to his solicitor of the delay which had taken place in bringing the affairs of Nicholas Carter to a settlement, when his solicitor told him, that Sir Robert Wigram's solicitor insisted on having an heir at law of John Carter, and that there was an heir-at-law, but that he could not be brought forward without danger to a considerable part of the freehold lands.

The solicitor of the plaintiff, on the other hand, denied, that he, on the occasion referred to by Price, or at any other time, made to Dalby the statement there ascribed to him; but he believed that he mentioned to Dalby a rumor he had heard, that Nicholas Carter had an elder brother, George, and that Dalby said he always understood Nicholas to have been the heir of John, and requested the deponent not to speak of his having heard any thing which might impeach the title of Nicholas as heir of his brother John. He further swore, that, at the time when he prepared the abstract, he firmly believed Nicholas Carter to have been the next brother and heir of John, and considered George to have been a younger brother of Nicholas; and that he never heard that there was any brother of John Carter older than Nicholas, or that George had left any issue, until several years after the sale of the estates, and until long after the deeds of 1816 were executed, and the fines levied.

1829; May 15.—The Vice Chancellor granted Sir Robert Wigram's motion, and refused the other motion, with costs.(*a*)

A motion was now made before the Lord Chancellor *on behalf of [*301] some of the defendants, that the order of the Vice Chancellor might be rescinded, and that it might be referred back to the master to inquire whether a good title to the premises could now be made.

Mr. *Knight* and Mr. *Wray*, Mr. *Horne* and Mr. *Whitmarsh*, Mr. *Teed* and Mr. *J. Russell*, for different parties in the cause, in support of the application.

There is no question that the only defect which exists in the title has been cured since the date of the report, and that the parties are now in a condition to give the purchaser all that he contracted for. In *Esdaile* v. *Stephenson*,(*b*) the rule applicable to such cases was laid down by Sir John Leach, after consultation with Lord Eldon, in the following words:—"If the master should report against the title, and at the hearing, upon further directions, the vendor had cured the defect, the court would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title; and if the fact whether the vendor could at the

(*a*) 3 Simmons, 29. (*b*) 6 Mad. 366.

hearing cure the defect were in question, it must be then sent back to the master to review his report, with the additional circumstances." The hearing of the exceptions in the present case corresponds to the hearing on further directions in a suit for specific performance regularly prosecuted. The same doctrine was acted upon in *Wynn* v. *Morgan*,(*a*) and *Coffin* v. *Cooper*.(*b*) In the latter case the title was made good by an act of parliament, obtained after the master had reported against the title.(*c*)

[*302] In the present case a further reference will not be attended with either inconvenience or injury to any one; and, on the contrary, injustice will be done, if Sir Robert Wigram is now discharged from his contract. He has been for five years in possession of the property; he has dealt with it as his own; and the parties cannot now be placed in the same situation as if no contract had been entered into.

Lechmere v. *Brasier*,(*d*) which was relied on in the court below, has no application to a question like the present. There the purchaser bought under a decree in which the direction for sale was clearly erroneous, the fact of the trading of the testator, which alone could give the plaintiffs a right to call for a sale, not being proved in the cause. To cure this defect, the decree had been re-heard, and another decree made, not reversing the former, but adding to it a new direction, which was also erroneous. What the court did there was merely to discharge the purchaser, when it was perfectly clear that the court had not then a right to direct a sale, and when it was altogether uncertain whether a valid decree for sale could ever be made.

The ground of the decision of the Vice Chancellor was, that the solicitor of the plaintiff had not communicated to Sir Robert Wigram the information which had reached him, that Nicholas Carter was not the heir of John. But if the conduct of the solicitor is viewed fairly, he does not appear to be liable to just blame. When application was made to him for proof of the heirship of Nicholas Carter, he communicated to the purchaser all that he had heard; he suppressed nothing; he stated nothing which he did not himself be-

[*303] lieve; and if the advisers of the purchaser were satisfied with imperfect evidence, the fault lay with them, and not with the vendors. It could not be said that the solicitor was negligent in not making a more careful search in the parish register: for it was as easy for the purchaser, as for the vendors, to cause such a search to be made. The charge against the solicitor amounts, in truth, to this, and no more, that he did not communicate to the adverse party a vague rumour, which, some years afterwards, reached his ears, of Nicholas having had an elder brother, George. But it does not appear that he was aware that George left issue: and, after an undisputed possession of more than forty years, while all the members of the family were living in the same neighborhood, nothing could be more natural than that he

(*a*) 7 Ves. 202. (*b*) 14 Ves. 205.

(*c*) See Sugden's Law of Vendors and Purchasers, 6th edit. p. 361, 8th edit. p. 373.

(*d*) 2 J. & W. 287.

should believe, what never seems to have been questioned by any person connected in blood or affinity with the parties, that Nicholas Carter was in fact heir to the lands and hereditaments, which he, and those claiming through him, had so long enjoyed by virtue of that supposed title. In truth, the period of time which was allowed to elapse after 1824, without hurrying on the completion of the conveyance to Sir Robert Wigram, is a convincing proof that the parties adverse to him were acting *bona fide*.

But suppose that the solicitor of these plaintiffs is deservedly open to blame,—why are the defendants to suffer for his acts or omissions, whose agent he never was, and among whom are married women and infants? They were not aware of any secret defect in the title: neither they nor their agents were accessary to the suppression or concealment of any fact. The present application is made on behalf of persons, who were not represented by the culpable individual: Why, are they to be bound by what he did or omitted to do? The practice of the court gives the conduct of sales under a decree to the plaintiffs and their solicitor: the power of management, *which belongs to the solicitor for the plaintiffs, is not derived from [*304] the defendants; if he does aught amiss, the blame must be imputed either to his clients, the plaintiffs, or to the court, whose rules confer on him a certain extent of power—and not to parties who had not the means of either preventing or controlling his misconduct.

Sir *Edward Sugden* and Mr. *Wigram*, contra:—The solicitor who acts in the management of the sale, who prepares and delivers the abstract, and who answers, or affects to answer the objections made to the title, must be considered, as, for this purpose, the agent of all who have any interest in the sale—the agent of all the parties to the suit. Now, as between vendor and purchaser the most perfect good faith is required; and, if, before the completion of the contract, there is either *suppressio veri* or *suggestio falsi*, there is an end to the rights of a vendor in a court of equity. To a vendor who has been acting with perfect *bona fides*,—who has laid before the purchaser his title, such as it exists,—the court has in some cases allowed the indulgence of remedying, by what means he may, any defect which may be discovered in it, before the question comes on for final adjudication. Those cases, however, are not very numerous; and there is the highest authority for saying that the indulgence will not be extended. "I will not," says Lord Eldon, "extend the rule which the court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied.(*a*) The question then simply is, has the rule ever been applied to such a case as the present? And it is for those who hold the affirmative to produce an instance in support of their position.

*It is impossible to doubt, that, while the title was in litigation on [*305]

(*a*) *Leehmere* v. *Brasier*, 2 J & W. 289.

other grounds, the solicitor of the vendors was perfectly aware, or had reason to believe, that Nicholas Carter was not the heir of John: and it unquestionably was his duty to have communicated his knowledge and belief on this point to Sir Robert Wigram, unless the court is prepared to say that a vendor is justified in knowingly palming a defective title upon an unsuspecting purchaser.

March 16.—THE LORD CHANCELLOR:—According to my present impression, I cannot but think that all the parties are responsible for the acts of Mr. Street, the solicitor for the plaintiffs. As Mr. Street acted as the agent for all these parties, it would be injustice to the purchaser, who treated with them all through the agency of Mr. Street, if they were not to be bound by his acts.[1]

I think the question resolves itself into this, whether or not there was any concealment. According to my present impression, from the affidavits made by Mr. Street, he does not deny the charge, or attempt to deny it. His attention was directed to the circumstance which affected the title; and the fair inference to be drawn from his affidavit is, that, his attention having been directed to it, he either purposely abstained from examining the register, or did examine the register and ascertained the facts, which are now admitted to have impeached the title. That being the case, I think the parties are responsible for what he did: And to say that, under these circumstances, there is still to be another reference to the master for the purpose of determining whether the title can now be made good, is more than, under any rule or practice of this court, the vendors are entitled to expect.

[*306] **March* 18.—THE LORD CHANCELLOR:—This sale took place in 1813; and the abstract of title was delivered towards the close of the same year. Mr. Whitton, the solicitor of the purchaser, Sir Robert Wigram, upon perusing the abstract, found, that a part of the property had been purchased by John Carter after the execution of his will; and he wrote to Messrs. Street and Wolfe, the solicitors for the plaintiffs in the cause, mentioning that circumstance, and saying that it would be necessary to satisfy him that Nicholas Carter was the heir at law of John. In answer to this, a letter was written from Mr. Street's office, stating that Nicholas was the brother and heir of John; and adding circumstances which confirmed that representation. This led to another letter from Mr. Whitton, in which he required the certificates of registry of the marriage of the parents of John and Nicholas, and of the baptism of the two sons; the entry of the marriage, it was answered, could not be found, but the certificates of baptism were furnished: and there the matter rested. Other objections being made to the title, nothing further was said with respect to that particular objection. These other objections to the title were all cleared up in the year 1824: and, in 1825, the

[1] Vide *Dryden* v. *Frost*, 3 Myl. & Cr. 670. 673. n. 2. 3 Russ. 493. n. 1.

draft of the conveyance was delivered to the vendors, and was approved on their behalf.

Shortly afterwards, a communication was made to Sir Robert Wigram, that, in point of fact, Nicholas Carter was not the heir at law of John; but that there had been an intermediate brother, who had left issue. This circumstance, as soon as it was made known to Sir Robert Wigram, was communicated to Mr. Whitton, his attorney, who instantly sent his clerk to St Giles, Cripplegate, to search the registry; and it was then ascertained, without the slightest difficulty, that, in point of fact, there *was [*307] an intermediate brother, George, who had left issue, George and John; that George had died early in infancy; and that John was the heir at law This led to a renewed controversy here; and that controversy terminated i another reference of the title to the master. The master examined into all the circumstances, was satisfied that the objection was a good objection, and reported against the title. The parties in the suit took exceptions to that report. In the meantime, they cleared up the difficulty by purchasing the interest of John: and they now pray, that, the difficulty being thus removed, another reference may be made to the master for the purpose of seeing whether the title is not now perfect, in order that Sir Robert Wigram may be compelled to complete his purchase. It may be observed that the title was made perfect before the exceptions came on to be heard: but that makes no difference.

One point which has been agitated at the bar is this, that, whatever Mr. Street may have done, these parties are not responsible for his acts. I think it is quite impossible to sustain such a position. Mr. Street was originally the solicitor for the plaintiffs; but, with reference to the purchase and sale, he must be considered as acting for all the parties in the cause; and it would be hard indeed upon a person contracting to purchase, if the solicitor, under these circumstances, were not to be considered as the agent of all the parties, and if all the parties were not responsible for his acts; because, in that case, if he committed fraud of any description, the only remedy of the purchaser would be against the solicitor; and he might still be compelled, under any circumstances, to perform his contract. Mr. Street, or Messrs. Street & Wolfe, acting in this business as agents for all the parties, all must be bound by his acts; and the question comes to this, what was the conduct of Mr. Street in the transaction?

*Now, Mr. Street swears most positively that, when the abstract [*308] was delivered, he was not aware of this defect in the title, and considered Nicholas Carter to be the heir at law of John. He confines, in the first instance, his affidavit to that particular time—the time when the abstract was delivered. However, in the subsequent part of the affidavit, he goes further, and the manner in which that part of the affidavit is sworn is remarkable. He says, "that he never was informed by any of the parties, or in any other way, that there was any brother of the said John Carter

older than the said Nicholas Carter, or that such brother George had left any issue, until *several years after* the estates were sold, and *long after* the deeds of February, and May, 1816, and the fines levied in pursuance thereof, were made and levied to the trustees."

Now, the estates were sold in the year 1813. He was not aware, he says, of the fact of there having been a brother of John Carter older than Nicholas, until *several years after* 1813; that would be satisfied by his having discovered those facts in the year 1817, or 1818. He then adds, that he was not aware of the circumstance until *long after* the deeds of February, and May, 1816, were made; and that would be satisfied also by his having discovered the fact in the year 1817, or 1818. The alteration in the phraseology is remarkable: for he says in the first instance, that he did not discover the matter, "until several years after the estates were sold;" but when he comes to refer to the date of the deeds of February, and May, 1816, he does not say "several years after the execution of those deeds," but "long after;" so that the whole of his affidavit is reconcilable with the supposition of his having made the discovery in the year 1817, or the year 1818.

[*309] *Mark how that corresponds with the affidavit of Price. Price swears that he heard from Dalby, that Dalby, about ten years before, (the affidavit is sworn in 1827,—which carries it back to the year 1817,) had a conversation with Street, and, in that conversation, was complaining of the delay which had taken place in bringing the affairs of Nicholas Carter to a final settlement; that Street explained, that the delay arose from the circumstance of Mr. Whitton requiring an heir at law of Nicholas Carter; and that there was an heir at law, but, if that heir at law were produced, he might claim a considerable part of the freehold property. Mr. Street does not deny the conversation with respect to the delay which had taken place; he does not deny that there was a conversation with respect to the heir at law; but he says that it amounted to nothing more than this, that he stated that he had heard of a rumor that Nicholas Carter had an elder brother George. Now, as Mr. Street admits that a conversation did take place, directing his attention to an heir at law, and as he does not take upon himself to swear that he did not know about that time, or as early as that period, that there was an elder brother of Nicholas, who had left issue, we must infer, and it is contrary to every principle of judicial proceedings not to infer, that about that time he did know of the fact. The probability is, (for he does not state that he did not direct the registry to be searched,) that, when this point was first brought under his attention, he caused the registry to be searched, in order to ascertain the fact; and, if he had searched the registry, it is quite obvious, from the affidavits in the cause, that he must, without the slightest difficulty, have discovered, that Nicholas Carter was not the heir of his brother John. Independently of this, as Mr. Street does not say when he first learned that there had been an elder brother of Nicholas, who had left issue, we must

take *it for granted that he discovered it during the discussion of [*310] the other objections to the title.

Now, Mr. Street having represented in the first instance, that Nicholas Carter was the heir at law of his brother John, and having, during the progress of the discussion on the other points, discovered that in that respect he was mistaken, and that another person was the heir at law, it was his duty, in fair and honest dealing, to have communicated that circumstance to the purchaser; and,—he not having communicated that circumstance to the purchaser, and the purchaser having, after the other objections to the title had been cleared up, discovered it by accident in consequence of a communication from another quarter, and this court having determined, upon exceptions to the master's report, that it constituted a good objection to the title—it appears to me quite impossible, that the parties in this suit, if they are bound by the acts of Mr. Street, have any equity to come into this court, to say that a further reference should be directed to the master for the purpose of ascertaining whether a good title can, or not, be now shown; for it is quite obvious, that, if this discovery had not been made, the vendors would have forced the purchaser to have taken the title such as it was, knowing that defect to have existed in it which has since been discovered.

Under these circumstances, it is quite impossible that the purchaser can be held to his contract; the application, therefore, made on the part of the vendors, must be refused, with costs.[1]

[1] Where there is an agreement to sell an estate, and it is afterwards discovered that a small portion of it, is the property of another person; the court will not discharge the purchaser from his contract, without giving the vendor an opportunity of acquiring a title to that portion. *Chamberlain* v. *Lee*, 10 Sim 444. In the case cited, Shadwell, V. C. said: "It is said that this court will not sanction a contract made by a person to sell, to another, that which, at the time, he knows he has not. I admit, if the case is that A. with reference to an estate which he knows to belong to B. contracts to sell it to C.; that it is a very wholesome rule that this court ought not to aid such a contract. But general rules do certainly admit of variation; and in my opinion, it would be vastly too harsh an interference with the common mode of the management of the business of mankind, if such a rule were taken to be applicable to a case where a party, apparently in the ownership, and *prima facie* appearing to have a title, sells land; and it afterwards turns out that a very small portion of it, is not his, (although he was in possession,) but is the property of another person. It would be a harsh application of the first principles of this court, were I to say that, in such a case, the contract was so radically bad that, even if the vendor could honestly procure his title to be made good by purchasing the property for himself from the rightful owner, in order that he might hand it over to the purchaser, he should not be at liberty to do so." See the next case. *Sidebotham* v. *Barrington*, 4 Beav. 110. *Ten Broeck* v. *Livingston*, 1 Johns. Ch. Rep. 357. *King* v. *Bardeau*, 6 Johns. Ch. Rep. 38. *Eyston* v. *Simonds*, 1 Yo. & Coll. C. C. 608. *Winne* v. *Reynolds*, 6 Paige, 407. *The Morris Canal Company* v. *Emmett*, 9 Paige, 168.

[*311] *COSTER *v.* TURNOR.

1830; February, 24, 27; March 31.

Under a decree directing the sale of an estate, which, as against T. one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser; afterwards, on the application of A., an order was made by the Vice-Chancellor discharging him from the purchase on the ground that the decree was not absolute as against T.; the plaintiff immediately gave notice of a motion before the Lord Chancellor to discharge that order, and, that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard; Held,

That the purchaser was entitled to be discharged at the time when the application was made, and that he having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect.

B. by the directions of a solicitor who was then concerned for a defendant T., had acted as clerk in court, for T., and in 1816, filed his answer; after that time T., was generally resident abroad; in 1822, an order was made directing that service of the subpœna on his clerk in court should be good service; at the hearing in 1823, no person appeared for T., and a decree *nisi*, was pronounced against him; in 1829, the solicitor, upon an application made to him by the plaintiff, declined to receive a notice on behalf of T., stating that he had long since ceased to be concerned for him and that he knew not where he was, nor whether he was living or dead; in 1829, the plaintiff obtained an order that service of the subpœna to show cause against the decree on the clerk in court of T. should be of good service; and the subpœna was served on B. who had not for many years done any act as clerk in court for T.: Held,

That B. was to be considered as still the clerk in court of T., and that the service of the subpœna was strictly regular.

THE plaintiff, William Coster, in 1815, being mortgagee with power to sell, of certain premises which were subject to two prior mortgages, filed his bill praying a sale, against Exuperious Turnor, the mortgagor, the two prior mortgagees, and several subsequent incumbrancers. Turnor put in his answer, in 1816; various proceedings were had, the cause was set down for hearing; and the plaintiff, not being able to serve a subpœna to hear judgment on Turnor personally, in consequence of his absence from England, obtained an order that service of the subpœna on his clerk in court, should be good service. Mr. Vizard was Turnor's solicitor in the cause. Mr. Vizar employed Mr. Baines as his clerk in court; and Mr. Baines in this suit acted as clerk in court for Turnor. The subpœna to hear judgment was served on Mr. Baines.

[*312] *The cause was brought to a hearing on the 15th of February, 1823, when Turnor not appearing, a decree was pronounced, which, as against him, was only a decree *nisi*. It purported to have been made in the presence of counsel for the plaintiff, and all the defendants, except E. Turnor, for whom it was stated no one had appeared, though his clerk in court had been served with a subpœna to hear judgment, and with an order directing that service of the subpœna on the clerk in court should be deemed go odservice on the defendant; it directed various accounts, and ordered among other things, that the estate should be sold, provided the plaintiff should within six months after the master had made

his report, pay off the two prior mortgagees, or obtain their consent to a sale; and it concluded with the usual declaration, that it was to be binding on Turnor, unless he, on being served with a subpœna to show cause against the same, should, at the return thereof, show good cause to the contrary.

The master made his report; the plaintiff or his solicitor prevailed on a friend to pay off the first two mortgagees, and took an assignment of their incumbrances; and, on the 25th of August, 1828, the property was put up for sale under the decree, when Mr. Crowdy purchased it at the price of 12,400*l.* He was subsequently reported the purchaser, and the report was confirmed.

In the course of the investigation of the title, it turned out that no steps had been taken to make the decree of February, 1823, absolute against Turnor, and that no subpœna to show cause had been served. On this ground a motion on behalf of Crowdy, was made on the 8th of July, 1829, before the Vice-Chancellor, that he might be discharged from his purchase; and the Vice-Chancellor ordered that he should be discharged from it.

*On the 10th July, 1829, the plaintiff gave notice of a motion [*313] before the Lord Chancellor, to rescind the order pronounced by the Vice-Chancellor.

Before this motion could be made, the plaintiff, on the 13th of July, 1829, by an *ex parte* petition at the Rolls, obtained an order, that the plaintiff should have leave to serve a subpœna requiring the defendant Turnor to show cause against the decree, and that service of the subpœna on Turnor's clerk in court should be deemed good service on Turnor. In the course of this proceeding, Mr. Vizard declined to receive a notice which the plaintiff sent to him as solicitor for Turnor; and stated that he was no longer concerned for Turnor, and did not know where he was, or whether he was living or dead. However, the subpœna was served on Mr. Baines; no cause was shown at the return of the writ, and the decree was made absolute. It was stated at the bar, that the affidavits did not show that the subpœna to show cause had been served on Mr. Baines, and that the decree had been made absolute; but the plaintiff offered, if these facts were doubted, to have them properly verified.

An attempt was afterwards made, but without success, to discharge the order of the 13th July, 1829, as irregular.

In this state of circumstances the motion to discharge the order of the Vice-Chancellor came on. In the discussion several topics were introduced, which ultimately did not affect the decision; the purchaser, on the one hand, alleging that various irregularities had been committed in the progress of the suit, which would enable any of the parties to overturn the decree under which the sale had been made: and the plaintiff, on the other hand, contending that the purchaser had done acts which *amounted to a [*314] waiver of that objection, by which he now sought to escape from his contract. But the point principally argued, and on which alone the decision

turned, was, whether the circumstance that the decree was not, at least at the time when the Vice-Chancellor pronounced his order, binding upon E. Turnor, constituted a sufficient ground for discharging Crowdy from his purchase.

Mr. *Horne* and Mr. *Temple*, for the motion, contended that there never was any ground for discharging the purchaser, because the defect, which was alleged to exist in the decree, was a mere matter of form, which the plaintiff could at any time supply by his own act. The purchaser might call on him at any time to supply it, in the same manner as he might require him to get in a legal estate which was outstanding in a trustee; and if the defect was cured within a reasonable time, the purchaser had nothing more to demand.

The only objection to the decree in the present suit, was, that, as E. Turnor did not appear at the hearing, it was not final against him, and that, according to the practice of the court, he might, at a future time, procure it to be reversed. But the same rules of practice, which gave him that privilege, prescribed certain forms, compliance with which put an end to the privilege, and rendered the decree as final and conclusive against Turnor, as it previously was against the other defendants. These forms had been complied with; the decree had been made absolute against Turnor. It must be admitted, that, if the decree had been made absolute before the sale took place, the objection could not have existed; yet the purchaser, in that state of things, would confessedly have been in a situation not a whit more secure or advantageous than that in which he actually was. It was not pretended

[*315] *that there had been any fraud or concealment. The plaintiff had acted throughout *bona fide*.

The Solicitor-General (Sir E. Sudgen) and Mr. *Roots*, for the purchaser, argued that, inasmuch as the decree was not a valid and binding decree at the time when the proceedings took place in the master's office, the sale itself was irregular, and the contract was *ab initio* such as the court would not sanction; and nothing that was done subsequently could make the sale regular, or the contract binding. The decree *nisi*, directing a sale, could not be acted upon, till it was made absolute. While it remained merely a decree *nisi*, it gave no authority to proceed to a sale; until Turnor either had shown cause, or, after due service of the *subpœna*, had neglected to do so, nothing could be done under it. The plaintiff omitted to make the decree absolute but he proceeded to do those acts which the decree could authorise him to do only when it was made absolute; and he now expects the court to say, that what he thus did was done regularly and properly.

It is alleged that he has since cured the defect; but the defect is such as does not admit of cure. The objection is, that, at the time of the sale, no decree was in force, which authorised a sale to be then made. In *Lechmere* v. *Brasier*,(*a*) a similar objection prevailed; and the purchaser was discharged, though the parties in the cause were proceeding to remedy the defect.

(*a*) 2 Jac. & Walker, 287.

Besides, the decree was defective, not only at the time when the proceedings took place in the master's office, but when the motion was made before the Vice-Chancellor, and when notice of the present appeal motion was given. When the question was argued before the Vice-Chancellor, the decree was admitted to be merely a decree *nisi*: no person could say whether it would ever be made absolute, for it was impossible to foretell whether Turnor might not show good cause against it; and it would be extravagant to contend, that a purchaser (even if the objection could have been remedied by matter *ex post facto*) was to abide the result of that contingency. The order of the Vice-Chancellor, therefore, was clearly right: if the present motion had been argued on the day for which notice of it was given, things would have been in the same state. Could the result be different, because the appellant had delayed to bring the motion on, and, in the mean time, had taken certain steps with a view to alter the situation of the parties? [*316]

In truth, however, those steps were nugatory. He got an order that service of the subpœna on Turnor's clerk in court should be deemed good service on Turnor; and it is said that the subpœna was served on Mr. Baines. That proceeding was a mere farce; for, at that time Mr. Baines was not the clerk in court of Mr. Turnor: Mr. Baines was clerk in court for Mr. Vizard, who had been Turnor's solicitor; and by Mr. Vizard's directions, and on his responsibility, he had formerly acted as clerk in court in this cause for Turnor. But Mr. Vizard had long ceased to be concerned for Turnor; he did not know where he was, or even whether he was alive or dead: and, when applied to by the plaintiff, he declined to receive a notice as agent or solicitor for Turnor, and refused to permit himself to be considered as in any way representing that gentleman. Under these circumstances, Mr. Baines, who had no authority except through Vizard, was no longer *de facto* the clerk in Court of Turnor, and could not be so considered.

Sir *Charles Wetherell* and Mr. *Sidebottom*, on behalf of some of the defendants, insisted on their right, and were allowed, to be heard in opposition to the motion. They cited *Agnew* v. *Lord Stair*, in the house of lords. [*317]

Mr. *Horne*, in reply, observed, that Mr. Baines, having once been appointed clerk in court in the cause for Turnor, must be held still to continue to represent him. The strict regularity of the proceedings, which had been taken to make the decree absolute, was established by the Master of the Rolls' dismissal of the application to discharge the order, which directed service of the subpœna on the clerk in court to be good service; and the decree, when once made absolute, would operate from the time when the decree *nisi* was pronounced.

Lechmere v. *Brasier* had not the slightest analogy to the present case. In *Lechmere* v. *Brasier* the decree was erroneous; here the decree was perfectly accurate; it would have been erroneous, had it been in form or

substance different from what it actually was. In *Lechmere v. Brasier* it was uncertain whether there ever would be a valid decree directing a sale, and whether the plaintiffs would establish a case entitling them to such relief: here all that remained to be done, was to make the decree absolute against Turnor: the plaintiff could at any moment take the steps necessary for that purpose; the decree and *de facto* has been made absolute.

In the course of the argument the LORD CHANCELLOR observed, that in *Lechmere* v. *Brasier* there was a substantial objection to the decree, arising out of the facts of the case; these facts still remained to be in-
[*318] vestigated, and the result of the investigation might have been *extremely prejudicial to the purchaser. There the plaintiffs had not proved that the testator was a trader within the meaning of the bankrupt laws; and until that act were established, the court had no authority to decree a sale; here the objection was purely personal, and arose out of the circumstance that the decree was a decree *nisi*, which the plaintiff had it in his power to make absolute; it was like the ordinary case of a defect of title which the vendor has the means of remedying by his own act.

1830; *March* 31.—THE LORD CHANCELLOR:—The question arises upon a sale in the master's office under a decree of this court, pronounced in 1823. A person of the name of Crowdy was declared to be the purchaser; and afterwards an abstract of title was sent to him or his solicitor, which stated, among other documents, the decree of 1823. It turned out, on further inquiry, that this decree was a decree *nisi* only; but it does not appear from the affidavits, or from the circumstances of the case, that there was any intentional deception in that representation of the decree which was made when the abstract was sent to Mr. Crowdy. This discovery being made, Mr. Crowdy objected to the title, and according to the statements contained in the affidavits, nothing was done by him afterwards to waive the objection. The case came on before the Vice-Chancellor, and the Vice-Chancellor was of opinion, upon the authority of *Lechmere* and *Brasier*,—not upon the facts of the case, but upon the principle and doctrines stated there,—that, under such circumstances, Mr. Crowdy was entitled to be discharged from his contract of purchase.

That decision having been pronounced by the Vice-Chancellor,
[*319] notice was given of an application to be *made to me, within a few days afterwards, to discharge his Honor's order. The facts and circumstances at that period were precisely the same as they were when the case was argued before the Vice-Chancellor; and I am of opinion, that under this state of things, as they then existed, the decision of the Vice-Chancellor was correct, and that there was no ground whatever to discharge the order pronounced by him.

It has been suggested, however, that while the motion was pending before

me, a subpœna has been served on Mr. Baines, formerly clerk in court to Mr. Exuperious Turnor, who appears to have been abroad; and that, upon the service of that subpœna, and the expiration of the time for showing cause, the decree has now been made absolute. Mr. Vizard who was originally concerned for Mr. Exuperious Turnor, employed Mr. Baines as his clerk in court but Mr. Vizard has for several years ceased to be at all concerned for Mr. Exuperious Turnor. Still, however, I believe that, in strictness, the service on the clerk in court, Mr. Baines, was a regular and proper service. He was the clerk in court of Mr. E. Turnor, the party in the cause: and that authority, never having been countermanded, must be considered as an existing authority. That he was served with a subpœna, and that the decree has since been made absolute, does not appear by any of the affidavits which have been handed up to me; but I understand the fact is so; and if it would authorize me to discharge the order, probably I should think it right to give an opportunity of filing further affidavits.

But I am of opinion that I ought to decide the case, as it stood when the motion was originally brought before me. At the time when notice of the application to me was given, the facts were precisely in the same *state as they were when the case was heard before the Vice- [*320] Chancellor. Now, the purchaser having, upon an application to the Vice-Chancellor, been once discharged from the contract, upon a ground which was then sufficient, and an application being almost immediately afterwards made to me, and the position of things being such that I should have refused the motion if then made, it would not be just, in consequence of that motion standing over, and the defect of the title having been repaired, if in point of fact it has been repaired, again to revive the contract which had been rescinded by the Vice-Chancellor.

The motion must be refused, with costs.

November.—As the judgment pronounced by the Lord Chancellor on the 31st of March was considered by the plaintiff's counsel to be at variance with the opinions which his lordship had thrown out incidently in the course of the argument on the motion, and therefore came upon them in some measure by surprise, the plaintiff was induced to make an application for the purpose of having the whole subject once more brought under his lordship's review. The motion was accordingly reheard during the sittings before Michaelmas term; and upon that rehearing the questions raised on the former discussions were again very fully argued.

November 22.—The Lord Chancellor delivered to the parties his written judgment, affirming the order which he had previously made.[1]

[1] Vide *Dalby* v. *Pullen*, ante 296. That a purchaser will not be compelled to take a defective or doubtful title, see further, 1 Sim. & Stu 205, n. 1. *Bryant* v. *Busk*, 4 Russ. 1. *Sharp* v. *Ad-*

[*321] *ACRAMAN *v.* BRISTOL DOCK COMPANY.*

1830; March 2:

An injunction allowed to be moved for *ex parte*, in a pressing case after the defendants had entered an appearance.

In this case counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard.

THE *Solicitor General* and MR. *Bigg* moved *ex parte* on bill and affidavits for a special injunction to restrain the Bristol dock company from letting off the water from the docks, the following morning, as the company threatened and intended to do, for the alleged purpose of cleansing them. The defendants had entered an appearance *gratis*, immediately on the filing of the bill; but it was not stated, nor did it appear, that they had been served with subpœnas at the time when the motion was made; although there was reason to believe that such was the fact, instructions to that effect having been forwarded, the day before, to the solicitor at Bristol.

Sir *Charles Witherell* now, on behalf of the Dock company, contended that, having appeared, they had a right to the usual notice. On argument, however, by the *Solicitor General*, who referred to a case in Vesey,(*a*) [*322] insisting that no such rule existed, and that *it would give parties an easy opportunity of defeating pressing cases for injunction, the objection was overruled.[1]

cock, id. 374. *Brown* v. *Haff*, 5 Paige 235. *Winne* v. *Reynolds*, 6 Paige, 407. *Piers* v. *Piers*, Sausse and Sc. 379. *Steele* v. *Philips*, 1 Hog. 49. Where real estate is sold by a master, under a decree, as and for a good title, the purchaser is only entitled to such a title as a purchaser of the premises at a private sale would be bound to receive from his vendor. *Spring* v. *Sandford*, 7 Paige, 550. "When a sale is made by a master in chancery under a decree or order of this court, and the purchaser is not informed at the time of sale that he is to take the risk of any defect in the title, the court will not compel him to complete his purchase, unless it can assure him that he will have, not only a legal title, such as will avail him in a court of law to defend the possession if necessary, but also a title that will not be set aside, or even seriously litigated in a court of equity. The rule appears to be, not to compel the acceptance of a title against which doubts or suspicions exist of such a character, as that the court cannot conscientiously warrant the estate to him." McCoun, V. C. *Coster* v. *Clarke*, 3 Edw. Ch. Rep. 430.

(*a*) *Allard* v. *Jones*, 15 Ves. 605. The general rule is, that after the defendant has appeared, a special injunction can be moved for only upon notice; *Marasco* v. *Boiton*, 2 Ves. S. 112. *Harrison* v. *Cockerell*, 3 Mer. 1. *Collard* v. *Cooper*, 6 Mad. 190. *Perry* v. *Weller*, 3 Russ. 519, in which a distinction is taken between a *gratis* appearance and an appearance entered upon service of the subpœna: but an exception seems to have been sometimes made, without reference to that distinction, where the threatened mischief is imminent, and would be irremediable; Lord Eldon's dictum, 3 B. C. C. 477. n. *Collard* v. *Cooper*, *Harrison* v. *Cockerell*, *Allard* v. *Jones*, and the principal case. As to the necessity for serving the defendant with a subpœna, see *Attorney General* v. *Nichol*, 16 Ves. 338. *Patrick* v. *Harrison*, 3 B. C. C. 476, and the cases referred to in Mr. Belt's note.

[1] In *Perry* v. *Weller*, 3 Russ. 519, the Lord Chancellor said;—"It is true that the defendant cannot, by his own voluntary act—by appearing *gratis*—defeat the plaintiff's application for an injunction *ex parte*. But the plaintiff if he serves the defendants with subpœnas, puts, by his own

The *Solicitor General* then insisted that this being in fact an *ex parte* motion, the defendants were not entitled to be heard by counsel: but the Lord Chancellor overruled that objection also; and Sir *C. Wetherell* and Mr. *Pemberton* were heard for the Dock company.

The question turned upon the construction of the acts of parliament constituting the company, and upon the effect of a number of affidavits which were fully gone into; and ultimately the injunction was refused.

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*GRAY *v.* CAMPBELL. SMITH *v.* CAMPBELL. [*323]

1830; February 25; March 6.

Order made *ex parte* to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

The like order made *ex parte* without payment of costs, on certificate that the bill had been amended since the contempt.

IN the first cause the defendant Campbell moved that he might now, on tender of costs to be taxed and certificate of answer filed, be discharged out of custody for contempt;—which was ordered.

In the second cause the *Solicitor General* moved *ex parte* that the defendant Campbell, who was a prisoner in the Fleet for contempt in not answering the original bill, might be discharged without payment of costs. Subsequently to his commitment, the plaintiffs obtained an order to amend their bill, and on a certificate of the six clerk that the amendments were actually on the file, the present application was made. The motion for the discharge of a party in contempt, on his answer being put in, the *Solicitor General* remarked was an *ex parte* motion, and this, he contended, was a stronger case.

THE LORD CHANCELLOR, after considering the point, made the order *ex parte*.[1]

The following case was afterwards furnished by Mr. Bedwell the registrar.

act, the latter in a situation which entitles them to notice of any application made against them." Where a defendant has appeared, "if a temporary injunction is necessary in the meantime to prevent serious loss or injury to the complainant, and a sufficient ground is laid therefor, the court directs the petition or supplemental bill to be filed, and grants an order for the defendant to show cause at the next motion day or convenient time, why the injunction as prayed for, should not be granted; and in the meantime a temporary injunction is issued to prevent the anticipated injury." Walworth, Ch. *Bloomfield* v. *Snowden*, 2 Paige, 357. A subpœna had been served, but no appearance having been entered by the defendant, a notice of motion for an injunction was served upon him personally, and he not appearing on the motion, an injunction was granted. *Ramsbottom* v. *Freeman* 4 Beav. 145. See further 1 Hoff. Ch. Pract. 80. 1 Barb. Ch. Pract. 81. 623. 3 Russ. 519. n. 1.

[1] What motions may be made *ex parte*; see the last case. 1 Hoff. Ch. Pract. 409, n. 2. 1 Barb. Ch. Pract. 567, 568. *Mendizabel* v. *Hullett*, and *Bird* v. *Hustler*, post, 324, 325.

[*324] *Ball v. Etches.

1817; November 13.

The plaintiff filed his original bill, and the defendant got into contempt for want of an answer. The answer was ready, but before it was filed, the plaintiff amended his bill, so that the clerk in court could not receive the answer to the original bill; and it being considered that the plaintiff had by his own act purged the defendant's contempt, the defendant moved at the rolls that he might be discharged. The practice being considered new, the motion was made next day at Westminster before Lord Eldon, when his Lordship, after consideration, granted it. The clerk in court issued a certificate of the bill being amended.[1]

Reg. Lib. B 1817, fol. 7.

Mendizabel v. Hullett.

1830; March 4

On the allowance of exceptions to the answer, leave given *ex parte* to the plaintiff to amend his bill, although it had been previously amended.

Exceptions had been taken to the defendant's answer, and some of them had, on reference, been allowed. The bill having been already once amended under the common order, Mr. *Wakefield* now moved *ex parte* for leave to amend, and that the defendant might answer the amendments and exceptions together. He had no affidavit stating that the amendments were material; but he submitted that the thirteenth of the new orders requiring notice, made no provision for this case; and as giving notice would enable the defendant to deprive the plaintiff of his advantage, by answering the exceptions immediately, the order could not be intended to apply.

The Lord Chancellor granted the motion, expressing an opinion that notice was not necessary in such a case.

[1] If the plaintiff accepts the answer, or replies, or moves upon it, which implies acceptance, he cannot use the process of contempt for the purpose of getting costs. The defendant may move as if the contempt was cleared. The plaintiff, if he means to enforce the payment of the costs under the process, should send back the answer. *Anon.* 15 Vesey, 174. *Const* v. *Ebers*, 1 Madd. Rep. 530. 1 Hoff. Ch. Pract. 181. But the plaintiff by taking an office copy of the defendant's answer, does not waive the contempt. *Woodward* v. *Twinaine*, 9 Sim. 301. Nor is a mere order to amend the bill a waiver of the contempt, as it creates no obstacle to the defendant's putting in his answer. *Livingston* v. *Cooke*, id. 468.

*Bird *v.* Hustler. (*a*) [*325]

1831; May 13, June 13.

The thirteenth of the new order does not apply to amendments made upon exceptions to the answer being submitted to or allowed: nor does it apply to amendments made before any answer is put in: but in all cases to which it does apply, notice is necessary as well as an affidavit, unless the court upon the particular circumstances dispenses with it.

On the 21st May, 1830, before an answer was put in, the plaintiff obtained the common order to amend his bill, which was amended accordingly. On the coming in of the answer, exceptions were taken to it for insufficiency, and submitted to, and the plaintiff thereupon, and before any farther answer was filed, moved for and obtained, as of course, an order to amend his bill, and that the exceptions and amendments might be answered together. On the 16th February, 1831, the defendant put in his answer to the original and amended bill, and his answer to the further amended bill. On a reference of those answers for insufficiency upon several of the old and three new exceptions, the master, on the 19th of March, reported in favor of some of the exceptions, and the same day the plainttff obtained, as of course, another order to amend, and that the defendant might answer the amendments and exceptions together, and at the same time made an affidavit that the proposed amendments were material, and not for the purpose of delay or vexation.

Sir *Charles Wetherell* and Mr. *Wright* moved to discharge that last order:—The proceedings have been grossly irregular. As the bill has been once previously amended, the order to amend obtained on the submission to exceptions ought to have been upon notice; but as the plaintiff had been suffered to proceed, the objection had been waived, and the point came now to be tried upon the regularity of *the last order, which stood precisely [*326] on the same footing with the preceding one. It had been granted *ex parte*, after a former order to amend, which the thirteenth of the new orders did not allow. That order expressly gives leave before replication to obtain one order to amend upon motion or petition without notice, "but no further leave shall be granted unless the court shall be satisfied by affidavit," &c. The words are absolute and unqualified, and there is no distinction between amendments proposed to be made after successfully excepting and others. An imperfect answer cannot be worse than no answer; and it is settled that a second order to amend before answer can only be had upon notice. *Tarlton* v. *Dyer*.(*b*) The distinction attempted to be raised, besides being directly in the teeth of the order, would encourage frivolous exceptions upon immaterial interrogatories, for the chance of succeeding on some one or two, and thereby evading the salutary check which the order imposes upon vexatious delays.

(*a*) As this case involves the same point with the preceding, and may be considered as having settled the practice, it has been thought advisable to insert it here.

(*b*) 1 Russ. & Myl. 1.

Sir *E. Sugden* and Mr. *Wakefield*, contra :—This is a case to which the thirteenth order cannot and was not intended to apply. The order is vaguely worded but it refers solely to amendments made after the answer has been put in. *Tarleton* v. *Dyer* has been much doubted ; and in a case of *Langdon* v. *Langdon*,(*a*) in which the same point arose, and which was very much contested, Lord Lyndhurst seemed inclined to recede from his former judgment, though the question was never finally disposed of. Here, as the answer is insufficient, it is as no answer, and then the case not contemplated by the order arises. The old rule was, that the plaintiff, although he required a further answer, might have the order to amend as of course, without costs, wherever exceptions were submitted to or allowed, and the judges [*327] *who framed the new orders would never have deprived a successful expectant of so important a privilege without saying so in distinct terms. This is the first time the point has been formally argued, but it has more than once been submitted in court to Lord Lyndhurst, who felt no hesitation in granting the motion *ex parte* : *Mendizabel* v. *Hullett*.(*b*) At any rate, the exigency of the thirteenth order has been fully complied with here ; for the leave to amend was obtained upon an affidavit of materiality, and the order so far from making notice imperative, says not a word upon the subject. Supposing notice, however, to be necessary, the court has a discretion, and has, in many instances, dispensed with it. *Smith* v. *Evans*. *Cottingham* v. *Potts*.(*c*)

June 13.—The Lord Chancellor stated the facts of the case, and remarked, that the objection, if valid, was equally applicable to the second amendment as to the third, which was the subject of the present motion, although it was certainly competent for a party to say he did not choose to avail himself of his strict right, and to consent to waive the benefit of it. His Lordship then proceeded :—

I have taken some time to consider this question, on account of this thirteenth order not having always received a very consistent or uniform interpretation, a circumstance which made it expedient that it should be looked into attentively, and that some communication should be had on the subject with the other branches of the court. That order, I am of opinion, is only applicable to cases where there has been an answer. If however there is no perfect answer, there cannot, in strictness of speech, be said to be an answer at all. If you look at the latter part of the order, you will see that that [*328] is the true construction ; for it is there declared, that " no *order to amend shall be made before replication, either without notice or upon affidavit, in manner thereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers, if there be two or more defendants, is to be deemed suf-

(*a*) Lincoln's Inn Hall, April, 1830. (*b*) Ante, p. 323. (*c*) 1 Russ. & My. 80, 81.

ficient." That clause appears to me to throw light upon the meaning of the whole. The Vice-Chancellor, who was himself one of the heads of the court at the time when the new orders were framed, and who has frequently had occasion to pay great attention to this particular order, and to decide upon it, entertains no doubt whatever that the construction to which I have come is the sound one, and that the present, therefore, is a case which, properly speaking, is not within the thirteenth order.

As the argument which was used at the bar drew into discussion, and cast a doubt upon the meaning of the first part of the order, I think it right to add my opinion upon that also, with respect to which I may state, that his Honor, the Vice-Chancellor, entirely concurs in the same view with myself; and that view would have been against this amendment, had we considered it to be a case at all coming within the scope of the order. There has been a slight omission in drawing it up; the words are these—"The plaintiff shall be at liberty, before filing a replication, to obtain, upon motion or petition, without notice, one order for leave to amend the bill; but no further leave to amend shall be granted before replication, unless the court shall be satisfied by affidavit," &c., and then several things are required of which the court is to be satisfied. The question thereupon arises, whether the court should be satisfied, unless there has been notice as well as an affidavit. In the case before me, there was an affidavit which went to all the particular matters required by the exigency of the order, but no notice had been given, and accordingly the whole must be considered as an *ex parte* proceeding. [*329] My opinion upon that point is, that if the sense of the word "satisfied" is to be the same in which it is taken in all other cases, it implies that the court must have exercised its judgment on the subject matter, and that cannot be effectually done unless both parties are brought before it; and consequently, in that view, notice is necessary as well as an affidavit. The clause then goes on,—"but no order to amend shall be made before replication, either without notice or upon affidavit, in manner hereinbefore mentioned, unless," &c.—which clearly shows that such an order is intended to be put in contrast with the orders obtained without notice; and that, in my opinion, distinguishes it from them.

One or two cases were cited as being in opposition to this doctrine, but on examination, the conflict will be found to be very trifling. It has been the practice both of his Honor and of Lord Lyndhurst to make an exception with respect to the necessity of notice, where a mere clerical error was to be amended.(*a*) So also in a case where the hardship arising from the great number of parties whom it would be necessary to serve, has induced the court to dispense with notice, as was done in *Cottingham* v. *Potts*, in which Lord Lyndhurst allowed the order to be obtained *ex parte*. This latter exception, however, relaxing the strictness of the rule where it was something

(*a*) The thirteenth order, in its revised shape, expressly excepts this case.

more than a clerical error that required the amendment, appears to demand greater consideration, before it shall be sanctioned and laid down as the admitted rule of the court.(a)

[*330] *ANON.

1831; March 6.

An accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs.

THE *Solicitor General* applied, on behalf of a bankrupt, for an order to compel an accountant, who had been professionally employed in the affairs of the bankruptcy, to deliver up the bankrupt's certificate. The certificate had been left in the accountant's hands for the purpose of procuring the Lord Chancellor's signature, and he now refused to give it up until his bill of costs should be paid. No lien, the *Solicitor General* submitted, could subsist upon such an instrument as a certificate. The bankrupt in the mean time was liable to be arrested; and although, probably, a judge would order him to be set at liberty, on the facts being disclosed, that remedy would be too late.

THE LORD CHANCELLOR made the order, observing, that unless there was some very special agreement, which did not appear to exist in this case, an accountant could have no right to retain a bankrupt's certificate in security for his bill of costs, which must be recovered in the ordinary way by an action.

[*331] *FERGUSON *v.* TADMAN.

1830; March 6.

Where an order directing money to be paid out of court is appealed, the accountant general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below.

MR. HORNE moved that the accountant general might be ordered to pay

(a) As the case of *Bird* v. *Hustler* has decided that the 13th of the new orders does not extend to motions for leave to amend after the answer has been successfully excepted to, it follows, that on such motions no affidavit is necessary (*Mendizabel* v. *King of Spain*, before the Vice-Chancellor, 3 Sim. 152, n., and *Mendizabel* v. *Hullett*, ante;) and from the principle on which Lord Brougham's judgment proceeds, as well as from his opinion in *Hands* v. *Green* (stated in 3 Sim. 152, n.,) it is clearly to be inferred that the 13th order does not apply to amendments made before any answer is put in; and that the first point, therefore, in *Tarleton* v. *Dyer* is now overruled. The revised edition of that order (promulgated 23d Nov. 1831) sets the point completely at rest; and the rule seems now to be, that a plaintiff may always, by motion of course, obtain one order to amend, after the answer is put in, how often soever he may have previously amended.

a sum of money out of court, which the decree had directed him to pay to certain parties in the cause, but which he had declined to pay in consequence of a petition of appeal having been presented against the decree.

THE LORD CHANCELLOR said, that it was now perfectly settled that an appeal did not stay the execution of the decree;[1] and that, for that purpose, a special application to the court where the order appealed from was pronounced, was rendered necessary by the 46th of the new orders. But he thought, that where the accountant general had notice of an appeal being presented, that officer exercised no more than a reasonable discretion in delaying to pay money in obedience to the order, till a sufficient time had elapsed to give the party appealing, an opportunity to make such an application. In the particular case before him, his Lordship said, that as the party obtaining the decree had already been delayed some time, it would probably not prejudice him, if the accountant general were directed to pay the money within a week, unless the Vice-Chancellor should make an order to stay proceedings in the mean time.

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*WHITE *v.* HALL. [*332]

1830; March 6.

A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings and now submitting to be bound by them.

THIS was a suit instituted on behalf of infants interested under the will of Sir H. White, against the executors of the will, who were also the guardians of the infants, to have the usual accounts taken, and the property of the infants ascertained and secured. A decree had been made directing the usual inquiries: the cause was afterwards heard on further directions, and an allowance approved of for the maintenance of the children.

Mr. *Pepys* now moved, on behalf of the father of the infant children, Mr. H. White, who had been named one of the executors by the will, and who had recently returned from India, where he had resided ever

[1] That an appeal is not necessarily a stay of proceedings, and when it will have that effect; see *Carr* v. *Hoxie* 13 Peters, 460. *Nerot* v. *Burnand*, 2 Russ. 56, 58, n. 1. *Walburn* v. *Ingelby*, 1 Myl. & K. 79, 84, 85, 86. *Wood* v. *Dwight*, 7 Johns. Ch. Rep. 295. *Hart* v. *The Mayor &c. of Albany*, 3 Paige, 381. *The American Insurance Company* v. *Oakley*, 9 Paige, 496, 502. To render an appeal a stay of proceedings from a decree directing the payment of money, the court pursues the analogy of the practice at common law, in relation to bail in error, and requires the amount to be paid into court, or sufficient security given. *Messonier* v. *Kauman*, 3 Johns. Ch. Rep. 66. *Riggs* v. *Murray*, id. 160. In *Barrow* v. *Rhinelander*, 3 Johns. Ch. Rep. 123, Kent, Ch. in eloquent and fervid language, exposes the abuse of the right of appeal and subsequently, in *Riggs* v. *Murray*, id. 162, in the like tone and spirit.

since the filing of the bill, that an appearance might be entered for him with the registrar, he consenting to abide by the decree already made in the suit, and submitting to account, if required; or upon such other terms as the court might think fit to impose. The Vice-Chancellor had refused the motion.

In support of the application, an affidavit of Mr. White was read, in which he stated that the suit was still pending; that since his return to England he had taken steps for proving the will, and that he was now desirous of undertaking the charge of the maintenance and education of his children, and of watching over and protecting their interests. The following cases were referred to; *Pitt* v. *Brewster*,(*a*) *Banister* v. *Way*,(*b*)
[*333] *Capel* v. **Butler*,(*c*) and the *dicta* of Lord Thurlow in *Harford* v. *Browning*.(*d*)

Mr. *Phillimore*, on behalf of the defendants, the other executors, opposed the motion. He observed, that in none of the cases cited, had the cause been heard on further directions at the time of the application. To allow a new party to intervene in the proceedings in the master's office, at so late a stage, would be both unnecessary and expensive. In such circumstances, the benefit of the decree could only be obtained by a supplemental bill.

*The Lord Chancellor, remarking that a supplemental bill would probably be much more expensive than the course proposed, said, it was true that in none of the cases cited a decree on further directions had been made; but though this cause had advanced a stage further, there did not appear to him to be any difference in principle between the case in Dickens and the present. The object was not to unravel the accounts, but simply that, as to the future proceedings, the party applying might be placed in the same situation as if he had been a party from the first; and there seemed to be no objection to such a course. If, therefore, Mr. White submitted to be bound by the decree and the accounts as they now stood, he ought to appoint a clerk in court, who should be at liberty to enter an appearance for him.[1]

(*a*) 1 Dick. 37. (*b*) 2 Dick. 686. (*c*) 2 S. & S. 457. (*d*) 1 Cox, 307.

[1] Vide *Bozon* v. *Bolland*, ante, 69.

*WALMSLEY v. FROUDE. [*334]

1830; March 6.

Where the plaintiff's solicitor, merely through ignorance or mistake, has neglected to comply with the exigency of the 17th order, the court will not relieve the plaintiff, upon terms, from the penal consequences of the neglect, without the consent of the other party.

THE *Solicitor General* and Mr. *Spence*, on behalf of the plaintiffs, moved that publication in this cause might be farther enlarged, and that the plaintiffs, might be at liberty to sue out a commission for the examination of witnesses returnable without delay, with the usual directions, &c.

It appeared from the affidavits that, on the first seal after Hilary term 1829, the plaintiffs entered into the peremptory undertaking to speed, and it was ordered that they should go to commission and execute the same in Hilary vacation, and give rules to pass publication in Easter term, and that the cause should be set down in Trinity term following. On the 13th of March, a copy of that order was served. Interrogatories were accordingly prepared and set down for revision to the country, and on the 2d of April, the plaintiffs were advised on the subject. On the fifth of April, the draft interrogatories were received by the plaintiff's solicitor, but no commission was sued out by him, nor did he take any farther steps in the cause prior to the 6th of May, the first day of Easter term, when he came up to London. On the 27th of May, the defendant proceeded to the examination of his witnesses, and publication was afterwards enlarged till the first day of Trinity term (19th June,) in order that the plaintiffs might have an opportunity of cross examining. In explanation of his apparent neglect, the solitor for the plaintiff in his affidavit stated, that in the month of April, he had been much occupied with other business; that when informed that the time for publication expired on the last day of Hilary vacation, he was completely *taken by surprise; that he had not at once directed his [*335] town agents to sue out the commission, because he was for some time unable to obtain the information necessary for settling the interrogatories; that when he did obtain it, and had got the interrogatories prepared, he found that as several of the witnesses lived at considerable distances, it would be impossible to have it executed and returned within the time limited by the order, and he had, therefore, not thought it advisable to incur an useless expense.

For the plaintiffs it was urged, that the refusal of this application would be attended with very great hardship, and would in fact render the suit nugatory. The plaintiffs were willing to offer any terms, and to pay all the costs occasioned by the delay and the motion: the indulgence sought would not delay the suit for a single hour, as the cause, though set down, could not come on for hearing in the regular course, till long after the return of the commission. It was a plain case of mistake, if the motion were not granted, they must either go to a hearing without any evidence, or dismiss their bill.

THE LORD CHANCELLOR said it was a very hard case, and asked Sir Charles Wetherell and Mr. Cooper, who appeared for the defendant, whether they would accede to the plaintiff's offer, which they declined, alleging that the conduct of the plaintiffs entitled them to no indulgence. The motion, they observed, was directly in the teeth of the seventeenth of the new orders, which might as well be abandoned altogether, if so direct a violation of their letter and spirit were allowed.

THE LORD CHANCELLOR:—The object of this order was to prevent delay in hearing the cause: here there are two months of delay, from
[*336] *April to June, altogether unaccounted for. The Vice-Chancellor thought that if ever the rule was to be acted upon, it must be acted upon in this instance: and if the other party will not accede to the plaintiffs' proposal, I must agree in that opinion, however much I regret it.

Motion refused, with costs.[1]

GRAFTON *v.* GRIFFIN.

1830; March 6, 9.

Where the plaintiff has by tortious means got into possession of property, pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession.

THE will of a testator contained the following clause: "I direct that the present tenant of the said copyhold and premises, or any of his children desirous of being continued therein, be suffered to hold and keep the said premises, upon payment of the present rent and the taxes and levies which the said present tenant has been accustomed to pay; and also all after taxes and levies to be assessed on the said premises, or any part thereof, during the time he or they shall respectively be tenant or tenants of the same; upon entering into proper agreements not to commit any waste, or do any damage to the said estates by sowing the same with flax, hemp, or woad, or by any other means whatsoever."

Mr. *Knight*, on behalf of the plaintiffs, who were the daughters of the first tenant, and one of whom was a married woman, moved for an injunction to stay proceedings in an action of ejectment brought by the defendant, the landlord, which stood for trial at the next assizes. He made the application on the gronnd that the interest of the plaintiffs was a trust only, not furnishing a good defence at law, and that as the married woman was not able strictly to fulfil the condition by entering into proper covenants, equity would interfere to modify and regulate the devise, and relieve her from a forfeiture.

[1] Vide *Strickland* v. *Strickland*, Cr. & Ph. 151.

*The Vice-Chancellor had refused the motion. [*337]

The *Solicitor General* and Mr. *Wakefield* opposed the application, contending that the devise was void for uncertainty, or at all events was exhausted by the tenant and his son having successively had the benefit of it; *Greenwood* v. *Tyler*(*a*); that the defence, if good, might be used at law; and that the conduct of the plaintiffs in turning out their brother's widow, before giving notice of their claim to the landlord, did not entitle them to any assistance in a court of equity.

March 9. THE LORD CHANCELLOR:—The bill states, that after the death of the former tenant in March last, the plaintiffs entered into possession. In the following July a notice was given, expressing their readiness to comply with conditions corresponding to those required under the will. It is not stated whether that notice was given before or after their forcible entry, but from the statement, I should rather assume that it was given after. That fact must have been in the knowledge of the plaintiffs, who, if it were given before, ought to have so stated. The answer denies that any of the plaintiffs but Grafton (who is the husband of one of the daughters) is in possession; and his possession, it alleges, was obtained by a forcible entry, and by turning out the widow. This court will not interfere to support a possession so acquired. It was said the court, would not allow the possession to be changed, pending a suit to determine the right; but the party himself has changed the possession by his own act, and the court will not interfere in such a case to prevent the other party from recovering, if he can, at law, the possession, of which he has been forcibly deprived.

Motion refused, with costs.[1]

(*a*) Hob. 314.

[1] "The granting or refusing of injunctions is a matter resting in the sound discretion of a court of equity; and consequently no injunction will be granted, whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case," &c. Besides, it is an "extensive and beneficial rule of this court, that he who asks equity must do equity." 2 Story's Eq. Juris. § 863. 959, a. b. *Brown* v. *Newall*, 2 Myl. & Cr. 270. 271. *Bramwell* v. *Holcomb*, 3 Myl. & Cr. 737. *Bacon* v. *Jones*, 4 Myl. & Cr. 433. *Sturgis* v. *Champneys*, 5 Myl. & Cr. 102. *Roberts* v. *Anderson*, 2 Johns. Ch. Rep. 202. *Snowden* v. *Noah*, Hopk. 347. *Bonaparte* v. *Camden and Amboy Railroad Company*, 1 Baldw. Cir. Rep. 218. *Kimberly* v. *Jennings*, 6 Sim. 240. *Pope* v. *Lord Duncannon*, 9 Sim. 177.

[*338] *GREIG v. SOMERVILLE.

1830; March 4, 13.

In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the master reported that no debts had been proved; and by the decree on further directions, 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to his separate account. In 1825, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out; Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff.

THE intestate, who had filled the office of Russian consul in London, died in the year 1807. A bill was filed in May, 1814, by his infant children against the administratrix, the widow, who had married again, to have the usual accounts taken, and praying, among other things, that the plaintiff W. Greig as one of the intestate's two children, might be declared entitled to one-third, part of the clear residue of the personal estate in his own right. The usual reference having been directed at the hearing, the master, in June, 1817, made his report, stating that he had caused advertisements to be published in the London Gazette and certain newspapers for creditors, but that no creditor had come in and proved any debt. On the 21st of June, 1817, the cause was heard on further directions; and under the decree then made, the costs were paid, and the whole of the fund apportioned and distributed. As the plaintiff was then an infant, his share (which, in consequence of his brother's death, became augmented so as to amount to four-ninths of the whole fund) was carried over to his separate account, and an annual allowance for his maintenance and education was directed to be paid out of the dividends.

[*339] In March, 1825, an application was made by petition *on behalf of the ambassador of the Emperor of Russia, praying he might be at liberty to go in before the master, and prove a debt alleged to have been due from the intestate to the emperor, and that the 21,000*l.* bank three per cents, standing to the infant plaintiff's account, (the only part of the intestate's estate then remaining in the name of the accountant general,) might not be sold until the master should have made his report: and the Vice-Chancellor made an order accordingly. A petition of appeal was afterwards presented against that order, and on the 26th July, 1825, the appeal came on to be heard before Lord Eldon C., when the question which it raised was fully argued. Before any judgment was given, however, the plaintiff attained his majority, and he thereupon, in November, 1826, presented another petition to the Lord Chancellor, praying that the stock and money standing to his separate account, or such part thereof less than the whole, as his lordship might think just, with

reference to the claim on behalf of the Russian government, might be transferred and paid to him. Upon the latter of these petitions his Lordship directed, that the sum of 8000*l.* should be paid to the plaintiff, there being still a fund in court, standing in his name, which was amply sufficient to cover the amount of the demand. But upon the appeal petition, although the matter was several times mentioned and discussed, his Lordship expressed considerable doubts, and eventually he resigned the great seal without having made any order on the subject; and it now became necessary to have the appeal reheard. An application by the plaintiff, that the whole of the fund, standing to his separate account in the cause, might be transferred and paid over to him, was brought on at the same time with the appeal.

The *Solicitor General*, Mr. *J. Martin*, and Mr. *J. Parker*, for the plaintiff:—This claim is barred by the statute of limitations; for [*340] the six years have run, at least twice over, since the debt was contracted. It does not appear when the demand first arose; probably long prior to the intestate's death: but the emperor has subsequently permitted nearly twenty years to elapse without taking legal steps to assert his right, and it was only within these few months that documents, which it is pretended are to substantiate the claim, were transmitted from Russia to his representatives here. He must have known of the intestate's death, for he immediately filled up the vacant office: and then was the proper moment to have the accounts of the deceased consul investigated, and the defalcation, if any, ascertained and made good. There can be no reason why the statute should not run against a foreign potentate as well as against the king's subjects.(*a*) His imperial majesty was in England in the summer of the year 1814, the very time when proceedings in the cause were going on before the master; and from the year 1807 downwards, he has never ceased to be represented in this country by agents who might, and if it had been valid, certainly would have prosecuted the claim. Why did they lie by, till all the papers and vouchers by which the demand might be rebutted or shown to be satisfied were likely to be lost or destroyed? They could have no difficulties with respect to evidence; for they might easily have compelled the attendance of witnesses from Russia, and have commanded every facility for establishing their right; an advantage which the plaintiff could not expect.

Independently of the statute, it is far too late for the *petitioner to [*341] bring forward so stale a claim after the suit has been wound up, and the property completely and finally distributed under the decree. The advertisements inserted in the London Gazette, and other papers, to which he has paid no attention, have concluded him; for the fund having once got *home*, as it did by being placed to the plaintiff's separate account, the court

(*a*) See 2 Atk. 612. A foreigner who resides always beyond sea, is not bound by the statute of limitations. *Strithorst* v. *Græme*, 2 Bl. 723. S. C. 3, Wils. 143. [The statute of limitations of the state of New York contains no exception in favour of non-resident plaintiffs.]

will not now interpose to recall it. A case of this kind has occurred :—An estate was sold under the order of the court, and the purchase money, when paid in, was carried to the account of the cause ; sometime afterwards, but before the money was distributed, the purchaser was threatened with eviction and he thereupon applied to prevent the price, which was still standing in the name of the accountant general, from being paid out. The court however said " No ; as far as you are concerned the transaction is final, and you must therefore take what rights and remedies you can obtain under your conveyance."(a) In like manner here, the suit, for all the general purposes of administration was at an end ; and the appropriation, made according to the usual practice, was merely with a view to protect and secure the infant's interests. Nor can the petitioner be allowed to convert a proceeding, originating in the accident of the plaintiff being then under age, and intended for his benefit, into an instrument of attack and oppression.

This claim would never have been heard of had the share of the plaintiff, like that of the widow, once found its way into the owner's hands. The administratrix, on receiving her distributive share, had her costs paid out of the fund, and then virtually ceased to be a party. For aught we know, she may have already settled the demand and got a release, although we have no means of ascertaining the fact, or of making it available on an [*342] *inquiry before the master. If, on the other hand, the debt still subsists, she, as representing the debtor, is the proper person against whom to proceed ; and if, as has been intimated, no action could be successfully maintained against her, equity will not interfere to give relief beyond the law, or to put the plaintiff in a worse situation than the party who is legally responsible. *Ex parte Dewdney*.(b) At all events such relief could only be had upon a new bill filed against the administratrix, to which, perhaps the present plaintiff might also be a defendant for the purpose of contribution : but it would be unjust to leave him to sustain single handed a harassing contest in the master's office, where he would be exposed to great difficulties as to evidence, and would lose the opportunity of stopping the demand *in limine*, by putting his defence in the shape of a demurrer or plea.

On the most unfavorable view, the plaintiff never could be charged beyond that proportion of the claim which his share bears to the whole residuary fund, that is, four-ninths. *Gillespie* v. *Alexander*.(c) That case may, probably, be cited in support of the petitioner ; but its circumstances were totally different. Before any apportionment had been made, the creditor obtained leave to prove his debt, so that the legatees had full notice : a report was made in favor of the claim ; and as there remained outstanding assets to be collected, the accounting parties must have continued before the court, and there was still a subsisting and effective suit. Here, however, the plaintiff's share was ap-

(a) *Thomas* v. *Powell*, 2 Cox, 394. (b) 15 Ves. 479. (c) 3 Russ. 130.

propriated eight years before any claim was suggested. Of the justice of that claim there is no proof beyond the loose affidavit of the present consul speaking to his belief; and the *administratrix, upon whom the bur- [*343] den ought to fall, has passed her accounts, and received all she can ever be entitled to.

Mr. *Horne* and Mr. *Collinson*, for the petitioner:—This question is decided by *Gillespie* v. *Alexander*, which was much considered, and is in conformity with the opinion thrown out by Lord Eldon, after hearing the argument on the present appeal. It is impossible to discover any substantial difference between the two cases. The plaintiff's residuary share, like that of a common legatee, was taken, subject to debts, and so long as it remains in the custody of the court that liability continues. It is vain to contend that the advertisements in the Gazette and the London newspapers, or a decree on further directions made in an amicable suit, can conclude the claim of a *bona fide* creditor: *Lashley* v. *Hogg*,(*a*) *Angell* v. *Haddon*:(*b*)—far more of one who was out of the jurisdiction.[1] The petitioner ought, therefore, to be at liberty to go in and prove for the full amount of his debt, leaving the question

(*a*) 11 Ves. 602.

(*b*) 1 Madd. 529. See also 1 S. & L. 242; and what Lord Eldon says in 3 Russ. 136. and 19 Ves. 339.

[1] "It is obvious that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it. It is for this reason that if a party, who has not gone in before the master applies to the court after the master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of wilful default in not claiming before the master, the court will refer it to the master to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the master. This is every day's practice with respect to creditors. For the same reason, if a creditor does not happen to discover the proceedings in the court, until after the distribution has been actually made, by the order of the court, amongst the parties having by the master's report an apparent title, although the court will protect the administrator who has acted under the orders of the court; yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no wilful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him."—Leach, M. R. *David* v. *Frowd*, 1 Myl. & K. 209. O'Loghlen, M. R. speaking of the inadequacy of advertisements, as notice, observes:—"What is it that is to have the effect of depriving the creditor of his right? He is not a party to the suit, or bound as such by the proceedings therein. Is it the advertisement for creditors to come in, and prove their demands? If the advertisement is to have that effect, the court ought to be more particular in its directions as to the publication of such advertisements; it should also adopt some publication to which all creditors should be bound to resort, and not leave the matter as at present; the publication of the advertisements varying in every case, according to the caprice of the solicitors in the cause, or the directions of the master. If the publication of the advertisement, and the neglect to prove, is to deprive the creditor of his right, why does the court permit a creditor, so long as there is a fund in court, to come in and prove his demand?" *Piers* v. *Piers*, Sausse & Sc. 407.

as to whether it shall be wholly borne by the fund in court, or rateably only to be determined afterwards. If the latter is the proper mode, as the judgment in *Gillespie* v. *Alexander* seems to indicate, there is an end of all difficulty about contribution; for the money, paid over to the infant's separate account, is bound in equity to bear its proportion of the debt, whatever may become of the share already received by the administratrix. Nor can it be accounted any hardship to the plaintiff, that a proceeding, of which he has had the benefit, should be also made an instrument for enabling him to discharge his just obligations. It is premature to argue the points that
[*344] have been raised upon *the statute or the laches. They will come to be discussed regularly in a later stage, either on the inquiry before the master, or on exceptions to his report. Every defence which the plaintiff could have made at law, or upon a new suit, will be then open, and in a more summary and less expensive way. Of course, if the debt be barred by the statute or by laches, or if it be not established by satisfactory evidence, the master will disallow the claim. All that we ask now is an opportunity of tendering our proof. It has never been supposed that the statute of limitations could run against a foreign prince, more especially against one, who, being an alien enemy till the year 1812, was unable till then to prosecute his claims in a British court. The whole of the intestate's property was not administered in the suit, a considerable portion having been retained by the administratrix, in her own hands, on account of her share. Her answer shows that the fund was not clear; for it speaks of claims made by the Russian government as being then unsettled, and the affidavits prove repeated applications to her upon the subject.

The *Solicitor General*, in reply.

The Lord Chancellor:—From the report of what took place when this case came before Lord Eldon, his Lordship seems to have considered that he had disposed of one of the questions here discussed, namely, whether the fund in court should be liable, as the order of the Vice-Chancellor had made it, to the full amount of the claim brought forward by the emperor of Russia, or to a proportionate part only. I think his Lordship's opinion upon that point corresponds with the principle of his subsequent decision in *Gillespie* v. *Alexander*, and I am certainly disposed to agree with him in that
[*345] opinion. The question, *however, stood over for consideration as to the other point, and it would rather seem that Lord Eldon then intended that the creditor should be allowed to come in and prove, though it is not very distinctly stated in what way, or upon what terms, that was to be done; and the matter again stood over for arrangement and further discussion. Since that time the parties are placed in a new position, inasmuch as, in the interval, the infant plaintiff has come of age. It does not appear what effect Lord Eldon thought that circumstance would have on the rights of the parties. I shall, therefore, take time to consider it.

1830.—Greig v. Somerville.

March 13.—THE LORD CHANCELLOR:—The intestate in this case died as far back as the year 1807, and the persons now claiming against his estate, on behalf of the Emperor of Russia, are public officers, and he was himself a public officer of the Russian government; and they therefore, must have known of his death immediately after it took place, and of the claims which that government had against him. In 1817, a final decree was pronounced, and under that decree the administratrix took out her share of the estate; and the remainder of the fund in court, amounting to four-ninths of the whole, was carried over to the account of the plaintiff, Mr. W. Greig, who was then an infant. Under these circumstances, it would, in my opinion, be unreasonable and unjust, that the share now remaining in court should be charged with the whole debt; and not, as was the opinion repeatedly expressed by Lord Eldon, and in which I fully agree, to the extent of four-ninths only. To that extent, therefore, I think it proper that the agents of the Emperor of Russia should be at liberty to go before the master to prove such debt, as they may be able to prove, as a debt due from the intestate, *subject, however, to such defence as the [*346] party might have availed himself of, in case a bill had been filed against him. Mr. Greig, I think, should be at liberty to take out the whole of the fund, with the exception of a sum equal to four-ninths of the amount of the present claim.[1]

The decree directed that the ambassador of the Emperor of Russia should be at liberty, on behalf of the Emperor, to go before the master and prove such debt due from the intestate to his imperial majesty as he might be able; and that the personal representative of the intestate, upon such proof, should have the benefit of any defence which he could have made, if

[1] A creditor, upon a proper case being shown by petition, may be permitted to come in and prove his debt, under a decree, at any time while the fund or any part thereof is under the control of the court, notwithstanding the time limited by the master for the creditors to come in and prove their debts, has expired. *Brooks* v. *Gibbons*, 4 Paige, 374. *Creditors of Shubrick* v. *Shubrick*, 1 M'Cord's (South Carolina) Ch. Rep. 406. Where there has been a general decree for an account and payment, a separate creditor or legatee cannot file a new bill for the same purpose, unless he could not have come in under the decree, or where he is entitled to more extended relief than he could have obtained in the former suit; in which cases he may file a new bill as supplementary to the former suit. *Brooks* v. *Gibbons*, ubi supra. For, as O'Loghlen, M. R. observes, "if creditors will not prove their demands under a decree, or apply before the fund is distributed, they may lose the benefit of the decree; but is there any case to show that they therefore lose their right to proceed for recovery of their demand?" *Piers* v. *Piers*, Sausse & Sc. 408. When a plaintiff amends his bill by inserting an allegation that it is filed in behalf of himself and all others standing in the same situation, a third person as to whom the right to sue was barred, at the time of such amendment, so that he could not have filed a bill himself, cannot come in and claim relief against the defendant under the decree made upon such amended bill. *Cunningham* v. *Pell*, 6 Paige, 655. See further as to the intervention of creditors. *Thompson* v. *Brown*, 4 Johns, Ch. Rep. 619, 643. *Hallett* v. *Hallett*, 2 Paige, 15. *Judson* v. *The Rossie Galena Company*, 9 Paige, 598. *David* v. *Frowd*, 1 Myl. & K. 200, 208.

his imperial majesty had filed a bill for the purpose of obtaining payment of the said debt, out of the assets of the said intestate. And that so much of the stock standing in the name of the accountant general upon the account of the plaintiff W. Greig as would be equal to four-ninths of the debt claimed should not be paid or transferred till the master had made his report, &c.

Reg. Lib. 1829, A. fol. 1651.

[*347] *SHEWEN *v.* VANDERHORST.(*a*)

1831; Nov. 22, 26.

Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute:

Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors.

Whether the master is himself bound to take the objection—*Quære?*

THIS was a suit instituted by a residuary legatee, for the purpose of having the real and personal estates of a testator administered, and the trusts of the will carried into execution. Under the usual decree, directing among other things, an account to be taken of the debts, a creditor, of the name of Palmer, went in to prove a debt, against which it was admitted that the statutory period had run, before the testator's death. The executor did not object to the proof in the master's office; but the objection that it was barred by the statute of limitations was taken and insisted upon by the plaintiff, and the master accordingly disallowed the claim. The master's opinion having been afterwards confirmed by the judgment of the Master of the Rolls, the creditor now appealed to the Lord Chancellor.[1]

Mr. *Pepys*, and Mr. *Wakefield*, for Mr. Palmer:—The act of parliament,(*b*) which takes away the remedy from a creditor who suffers six years to elapse without enforcing his demand, but does not destroy the obligation, places the original debtor and his legal representative on precisely the same footing. The privilege thereby conferred is purely personal to them. According to their discretion they may, or they may not, think proper to avail [*348] themselves of the statute; but if they are *willing to forego it, it is not competent for any other individual, least of all for a residuary legatee who is a mere volunteer, to insist upon the objection for his own benefit, and

(*a*) This case is inserted here on account of its connection with some of the topics discussed in *Greig* v. *Sommerville*.

(*b*) 21 Jac. 1, c. 16.

[1] For the report of the case before the Master of the Rolls, Sir John Leach, see 2 Russ. & M. 75.

to the prejudice of an honest creditor. It is a settled rule, and it has been so laid down by Lord Hardwicke, that "no executor is compellable, either at law or in equity, to take advantage of the statute of limitations against a claim otherwise well founded;" *Norton* v. *Frecker.*(*a*) In *Castleton* v. *Fanshaw*,(*b*) it was held by Lord Somers, that where creditors, whose debts were barred by lapse of time, were seeking to recover them by action, this court would not, in favor of a residuary legatee, compel the executor to plead the statute at law. That case, so far as its circumstances can be collected from the report, appears to have been closely analogous to the present, and its authority has never been disputed.(*c*) The power of defeating an obligation morally binding on the conscience, by relying on the statute of limitations, has always been regarded by the court with extreme suspicion and jealousy. The privilege has never hitherto been extended to any but the personal representatives of the debtor, and even as to them it *has been confined [*349] within the narrowest limits; for if a suit had been brought for the recovery of this particular debt, and the executors had from any cause neglected to avail themselves of the objection, by way of demurrer or plea, of by expressly stating it in their answer, it is admitted that they could not afterwards have recourse to that species of defence.[1] If the objection be not raised distinctly on the record, it is too late to urge it at the hearing. Upon principle, what difference should it make that here payment is sought not by a separate bill, (which, if that is to be the rule in future, will encourage a multiplicity of suits, and load the estate with great additional expense,) but under the common decree in an administration suit, directing an account of the debts? When creditors, taking the benefit of such a decree, carry their claims into the master's office, the personal representative is there permitted to exercise the same privilege of setting up the statute in bar of their demands, as he might have done against an action or a bill: but if he sees fit to waive his right, neither the master, nor any other party, is entitled to make the objection.

Suppose this had been a creditor's suit, and the usual decree had been pronounced, could any reasonable ground be assigned for the distinction which his Honor's decision necessarily introduces, between the situation of the

(*a*) 1 Atk. 526.

(*b*) 1 Eq. Ab. 303. See also what Sir S. Romily says arguendo, 13 Ves. 469.

(*c*) From the report of the case in Pr. Ch. 99, which was not referred to, but where the circumstances are more fully and distinctly stated, *Castleton* v. *Fanshaw* appears to have been a suit by the residuary legatee to administer a testator's estate. The plaintiff there was desirous that the statute should be set up against certain creditors, who had gone before the master to prove their debts; but the executors not choosing to take advantage of that defence, the Lord Chancellor refused to listen to the objection, coming from the residuary legatee, and directed the debts to be paid: and he rejected an application that the creditors should be ordered to bring actions to recover their demands at law, and that the plaintiff should have liberty to stand in the place of the executors, as the defendant in those actions, and to plead the statute of limitations.

[1] Vide *Winter* v. *Innes*, 4 M. & Cr. 111. *Walter* v. *Radcliffe*, 2 Desau. 577.

plaintiff on the record, and all the other creditors who may go in and prove? The language of Lord Eldon, in *Ex parte Dewdney*,(a) is quite consistent with the notion that the privilege is strictly confined to the executor: for when his Lordship there says, that in a creditor's suit, the constant course in the master's office is to take the objection against other creditors, he means no more than this, that though the executors have a discretion, as to pleading [*350] the statute against the creditor by whom *the bill is filed, they do not, by waiving it, as against him, preclude themselves from raising the objection against other creditors going in before the master; but his Lordship never could have intended, in opposition to the authorities referred to, to have disputed or limited the privilege of the personal representative.

The *Solicitor General*, and Mr. *Piggott*, for the defendants the executors, stated, that as the executors were convinced that the demand in question, though barred by lapse of time, had not been paid, and was therefore a just debt, they had only acted as they knew their testator would have done, and as they conceived they had a legal right to do, in declining to avail themselves of the dishonest defence which the statute might have afforded.

Sir *Edward Sugden*, and Mr. *Barber*, for the plaintiff:—This case shows the wisdom of the court in restricting the discretionary power of the personal representative within narrow bounds. That power would otherwise be liable to great abuse; for if (as for aught that appears may be the fact here) the executors be disposed to collude with creditors like Mr. Palmer, the consequences might be highly injurious to those who have still valid and recoverable demands, as well as to all other parties who may happen to have an interest in the fund. The moment, therefore, that a decree is made in a creditor's suit (and the rule must be the same in a suit by legatees,) the discretion of the executor ceases, and he becomes utterly powerless; no action is permitted to be brought against him; the court immediately steps into his place, and itself exercises his functions for the benefit of all parties concerned: it becomes competent for any party, without his sanction or concurrence, to take the objec- [*351] tion *in the master's office; and even if no one should be there disposed to interfere, still it is the duty of the master, acting in behalf of those who may not be present or able to protect themselves, to insist upon the bar which the statute has created against stale demands. The officer of the court knows no partialities or preferences, nor will he listen to those of the executor; he does not wait to be told, whether the executor is, or is not, willing that a debt should be paid; but he simply inquires whether it be a valid and subsisting claim; and unless he is satisfied that it is so, he disallows it. It appears from another report(b) of the case referred to in Equity Cases Abridged that the creditors there had compromised their claims with the executors, on a representation that the assets were deficient; and when assets were afterwards recovered, the main question being whether this com-

(a) 15 Ves. 498. (b) 2 Eq. Ab. 254, pl. 1. Ib. 259, pl. 1.

promise should stand, the court declined to interfere. The whole seems to have been matter of arrangement. The case, besides, is stated so vaguely, that little reliance can be placed upon its accuracy, and it has never been recognized since. In *Maltby* v. *Russell*(*a*) the present Master of the Rolls, although he felt himself bound by the authorities, expressed a strong opinion against the right of an executor to favor some creditors in preference to others, after a creditor's bill had been filed for an account, but before a decree had been obtained. His Honor never imagined that *after* a decree such a right could be seriously asserted.[1]

The principle on which the right to resort to this defence is upheld in courts of equity is clearly stated by Sir. T. Plumer, towards the close of his judgment in *Burke* v. *Jones*,(*b*) and it rests, not on favor to the executors, but on the presumed intention of the testator; *as to [*352] which, after a decree, it is for the court and not for the personal representative to judge. Indeed, the effect of a decree for an account is to convert all the parties into *quasi actors*.[2] Here a residuary legatee takes the objection; but it is clear from Lord Eldon's language in *Ex parte Dewdney*, that his Lordship considered it to be the duty of the master, without reference to the parties, to set up the bar of the statute, just as the commissioners are in the habit of doing every day in bankruptcy, without consulting the wishes of the bankrupt or the other creditors.

The Lord Chancellor(*c*) said, he entertained little or no doubt: he was of opinion that the observations of Lord Eldon, as well as the analogy of the rule in bankruptcy, bore strongly upon the subject under discussion; but as he had been pressed to look into the cases referred to, and the point was also in some measure new, he should take a few days to consider it.

November 26.—The Lord Chancellor:—The farther consideration I have given to the subject has not been affected by the authority of the case of *Castleton* v. *Fanshaw*, in 1 Equity Cases Abridged, which was so strongly relied upon by the counsel for the creditor. That case goes only to this extent, that where an executor is sued at law, a court of equity will not compel him to plead the statute, a proposition which, in fact, amounts to no more than this, that the court will not call upon him, in administering the estate here, to set up the statute as a bar to any demands that may be made against the assets.[3] But the question here is, whether, when a decree has been pronounced, taking possession of the estate, and *vesting it in the court for the purpose of distribution, a decree by which [*353]

(*a*) 2 S. & S. 227. (*b*) 2 V. & B. 290. (*c*) Lord Brougham.

[1] Vide *Mactier* v. *Lawrence*, 7 Johns. Ch. Rep. 206.

[2] Vide *Hallett* v. *Hallett*, 2 Paige, 15. *Headford* v. *Storie*, 2 Sim. & Stu. 196. *Onge* v. *Truelock*, 2 Moll. 31.

[3] Vide *Whitney* v. *Whitney*, 5 Dana's (Ky) Rep. 331.

the accounts are directed to be taken, and the assets are to be administered in the master's office, and after which the common law must be altogether silent; [1] whether—under these circumstances, if the objection that the statute has barred the remedy be raised against a debt, and in whatsoever way or by whomsoever, being parties in the suit, be they creditors or executors, or even volunteers, the objection be raised,—it must not be considered fatal? And without at present saying how far the master is himself entitled to set up the objection, I can see no reason, certainly, why it may not be competently taken by a creditor or a volunteer, as well as by the personal representative. The order of the Master of the Rolls must, therefore, be affirmed.[2]

[*354] *POWELL *v.* WOOD.

1830; March 11.

Order made *nisi* that an issue might be taken *pro confesso*, the plaintiff in the issue having repeatedly made default.

MR. PARKER, for the plaintiff, moved, on notice, that an issue which the Master of the Rolls had, in the year 1827, directed to be tried in Middlesex, and in which the defendant in equity was to be the plaintiff, should be taken *pro confesso*, on an affidavit of the facts,—that the plaintiff in the interval had repeatedly made default, and had declined going to trial, and also an affidavit of service of the notice of motion.

No counsel appeared to oppose the application.

THE LORD CHANCELLOR, after consulting with the registrar (Mr. Bedwell,) granted the order *nisi*.(*a*)[3]

(*a*) See on this point *Wilson* v. *Ginger*, 2 Dick. 521. *Gardiner* v. *Rowe*, 4 Madd. 236. *Anon*, ib. 255. 1 J. & W. 226. 2 Fowl. Ex. P. 197.

[1] Vide *Whitaker* v. *Wright*, 2 Hare, 314.

[2] That one creditor may contest, before the master the claim of another creditor, and, in that respect, become an *actor*, see *Owens* v. *Dickenson*, Cr. & Ph. 48. *Judson* v. *Rossie Galena Company*, 9 Paige, 601. *Whitaker* v. *Wright*, 2 Hare, 314. *Tomlin* v. *Tomlin*, 1 Hare, 248. In the first cited case (p. 56) Lord Cottenham said: "where there is a contest between specific incumbrancers on an estate, the plaintiff has only to prove his debt, once for all, at the hearing; because all the parties interested in disputing it, are then before the court. But, in a suit by one or more creditors on behalf of all, as every creditor has a right to question the claim of every other, because it may interfere with his own, and as all are not before the court at the hearing, the plaintiff in such a case is called upon to prove his debt over again before the master, although he may have established it here; and I have known several instances, in which the debt, after having been proved here, has failed before the master and ultimately the bill has been dismissed."

[3] An issue was ordered to be taken *pro confesso* against a party who was to be plaintiff in the issue, and who had neglected to proceed to trial of it, at the time appointed by the order by which the issue had been directed; no reason being alleged for not having proceeded in conformity with

In re Fitch.

1830; March 11.

An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference under the circumstances, on the application of the committee.

Mr. Roupell, on behalf of the committee of a lunatic's estate, applied for permission to make a reduction of 15 per cent. on the rent, which, to the amount of 400*l*. a year, was paid by a tenant of the estate. The application was supported by a strong affidavit of the committee, in which he stated that in his judgment the abatement was reasonable and necessary; that similar abatements had been very generally made to the farmers in [*355] that part of the country; and that this particular tenant had, from the pressure of the times, got into arrear, but was highly respectable. Mr. *Roupell* submitted, that as the evidence now before the court was exactly the same as would be tendered in the master's office, and the whole sum to be abated was only 60*l*., the order should be made at once, without the expense of a reference to the master.

The Lord Chancellor made the order without a reference.(*a*)[1]

In re Thompson.

1830; March 11.

Will of a testator subsequently found a lunatic, directed to be deposited in the custody of the master.

Mr. Parker applied for an order on the petitioner, who was committee of the person and estate of a lunatic, to deposit the lunatic's will, which had come into his hands many years ago, in the custody of the master to whom the matter was referred, or with such other person as the court should think proper; on an affidavit of the facts that the will was in the same state in which the petitioner received it, &c. The same thing, it was stated, had been done in Cresswell's lunacy. The next of kin were served, and consented.

the order. *Carsborne* v. *Barsham*, 5 Myl. & Cr. 113. A negotiation for a compromise was considered a reasonable cause, "as the parties could not be expected to prepare for trial while such a negotiation was pending." *Johnston* v. *Todd*, 3 Beav. 218.

[1] As to orders in lunacy made without reference, see *Ex parte Farrow*, ante, 112. *In re Avery*, post, 356.

(*a*) Where the object is to obtain the authority of the court for an abatement of the rent paid by tenants upon the estate of a lunatic, Lord Brougham, C., following the rule laid down by Lord Eldon (*Ex parte Town*, 1 T. & R. 1,) uniformly requires that the petition shall be presented by the committee; and on several occasions his Lordship has dismissed such applications, on the ground that they did not come from the committee but the tenant.

THE LORD CHANCELLOR thought it was the proper course, and made the order accordingly.

[*356] *IN RE AVERY.

1830; March 17.

Order made for a transfer of stock under the 56 G. 3, c. 60, without a reference.

A PETITION entitled "In the matter of M. A., a person of unsound mind, and in the matter of an act," &c. (56 G. 3, c. 60,) was presented by the committee of a lunatic, stating that 6300*l.* of stock was standing in the name of the lunatic; that as no dividends had been claimed on that sum for twenty-seven years, the stock had been carried over to a separate account, under the provisions of the act of parliament, and that the bank, on being applied to, refused to make the transfer required by the committee, without the sanction of the court.

Mr. *Phillimore*, who supported the application, asked that the transfer might now be directed without a reference, urging that the affidavits clearly established the identity of the lunatic with the person whose name appeared in the bank books; and Mr. *Wray*, for the next of kin, consented.

THE LORD CHANCELLOR at first entertained doubts; but afterwards, on referring to *Ex parte Nicholl*,(*a*) he made the order without a reference.[1]

[*357] *LEAKE *v.* NALDER.

1830; March 17.

An order was made that the defendant should pay a sum of money by a certain day, or, on default, should stand committed. The plaintiff having been unable to serve that order in time, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk in court good service: The second order was irregular: it ought to have been made on notice.

AN order was made that the defendant should pay a sum of money within a limited period, or that, in default, he should stand committed. In consequence of his keeping himself out of the way, however, it became impossible to serve him with the order before the time specified had expired; and a second order was therefore obtained by the plaintiff, as of course, to enlarge the time allowed for payment of the money, and that service of the order on the defendant's clerk in court might be deemed good service.

(*a*) 1 Turn. & Russ. 119.

[1] Vide *Ex parte Ram*, 3 Myl. & Cr. 25.

A motion having been subsequently made, that an attachment might issue for a contempt in not complying with this second order, the Lord Chancellor, after consulting with the registrar, expressed a clear opinion that the order was irregular, on the ground that it was obtained without notice; and he accordingly directed it to be discharged.

Mr. *Spence*, for the plaintiff.

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*BRADSHAW *v.* BRADSHAW. [*358]

1830; March 20.

Where a witness is served with a subpœna to produce deeds on the execution of a commission, it is not necessary that there should be a written interrogatory as to the fact of his having them in his possession; and if he then takes upon himself to refuse production, he does so at the peril of costs in the event of his failing to satisfy the court of his right to withhold them.

ON the execution of a commission for the examination of witnesses in the country, a solicitor of the name of Higgin was served with a subpœna *duces tecum*, and also with a summons from the commissioners, requiring him to appear before them on a stated day, and to produce a certain deed which it was necessary to prove in the cause, and which, there was good reason for believing, was in his custody. Higgin accordingly attended at the proper place and time, and answered all the written interrogatories; but on being verbally asked by the plaintiff's solicitor, whether he had the deed in question, he refused to give any answer, and declined to produce it; and it consequently became impossible to take the deposition of an attesting witness, who was in attendance for the purpose of proving that the deed had been duly executed.

On an application to the Vice-Chancellor, his Honor was of opinion that Higgin had shown no sufficient ground to justify him in withholding the deed; and an order was made, that he should attend before the commissioners, and produce it, and should pay to the plaintiff all the costs occasioned by his previous refusal.[1]

Mr. *Spence*, and Mr. *S. Sharpe*, moved to discharge that order. They stated that the objection of Mr. Higgin rested upon two grounds: First, he claimed on behalf of a client an interest in the deed, in respect of which that client ought to have been made a party to the suit: Secondly, as the interrogatory put to him with respect to his having the deed in his possession was *not in writing, he did not conceive that he was bound to [*359] answer it. The latter, though apparently an objection of form, was important, with reference to the rights of witnesses, who, if the Vice-Chancellor's order were affirmed, would, in a case of very frequent occurrence, be deprived of the privilege of demurring. According to the established prac-

[1] The case before the Vice-Chancellor, Sir Launcelot Shadwell, is reported, 3 Sim. 285.

tice, which was followed in *Parkhurst* v. *Lowten*,(a) there ought to have been a written interrogatory as to the fact of possession, in order to give Mr. Higgin an opportunity of explaining the reasons why he could not produce the instrument without a breach of duty to his client. And as the commissioners were not competent to decide upon that point, the only regular way in which the matter could be brought under the consideration of the court was upon the formal demurrer of the witness, specifying the interrogatory objected to, and setting forth at large the grounds of the objection. A demand to produce deeds was in fact an interrogatory, for it necessarily involved an answer to the question, whether the witness had them in his custody or not. *Bowman* v. *Rodwell*.(b) *Shaw* v. *Morgan*.(c)

Mr. *Pepys* for the plaintiff, opposed the motion.

The Lord Chancellor said, that in his opinion no written interrogatory was necessary, Mr. Higgin being bound in virtue of the subpœna and the summons, to produce the instrument in question, if he had it in his possession. It was true that a witness served with a *subpœna duces tecum* to produce deeds might take upon himself to refuse such production, and he might be well or ill advised in so doing: but the refusal was at his own peril; [*360] and if, when the matter was brought before the *court by an application against him, he failed in justifying the course he had pursued he must abide the consequences. If, on the other hand, he succeeded in establishing such an interest in the deeds as entitled him to withhold them, the court would certainly protect his right. Here the Vice-Chancellor thought that the reasons of the witness were unsatisfactory; and his Lordship saw no ground for differing in opinion with his Honor.

Motion refused, with costs.[1]

(a) 3 Mad. 121. S. C. 2 Sw. 194, where all the cases are collected.
(b) 1 Mad. 266. (c) 4 Mad. 54.

[1] So, where a defendant is ordered to be examined before the master, if he refuse to answer questions which are relevant and proper, he will be compelled to pay the costs of an application to the court to compel him to answer; and he may be otherwise punished for the contempt. *Gilon* v. *Albert*, 7 Paige, 278. A *subpœna duces tecum* directing the witnesses to produce "all and every the books and book of account, and other books and accounts, in his custody, possession and power containing any entries relating to the sum of, &c." is too general. *The Attorney General* v. *Wilson*, 9 Sim. 526.

In re Buckle.

1830; March 20.

Extra costs occasioned by a mistake of the master allowed to a creditor proving his debt against a lunatic's estate.

A Creditor obtained leave, in the year 1814, to go in and prove his debt at his own expense, against a lunatic's estate. When he went before the master to make such proof, it was discovered, that in consequence of a misapprehension arising from an error in the papers carried in by the committee, the master had overrated the lunatic's fortune and had been induced to make him an allowance which amounted to the whole of his income, and left nothing to satisfy the claims of creditors. On the fact being discovered, a petition was presented on behalf of the creditor, praying that the estate might be rectified, and the lunatic's allowance reduced: but before it came on to be heard, the lunatic, by the death of his mother, became entitled to considerable additional property, and the reference, therefore, was no longer necessary. The only question to be discussed now, was as to the costs of these proceedings on the part of the creditor, beyond the ordinary expenses of proving his debt. Mr. Spence insisted that the creditor was entitled to them, inasmuch as they *originated in a mis-statement of the committee, and [*361] were not the common costs of proving a debt.

Mr. *Blenman*, contra, contended that the question was decided by the terms of Lord Eldon's order, which directed the creditor to go in and prove his debt he paying the costs of the proof and all consequential charges. The inquiries had been instituted by the master for his own satisfaction.

The Lord Chancellor said that these additional costs, arising out of a mistake caused by the mis-statement of the committee, ought not to fall on the creditor, but that the same, and the costs of this application, ought to be deducted from the costs he was to pay.

Wickens v. Townshend.

1830; March 25.

A solicitor who receives rents in a cause without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff.

This was a bill filed by incumbrancers, praying a sale of mortgaged estates for the purpose of satisfying their debts. In the progress of the suit, an order was obtained appointing a receiver; but in consequence of the sureties having delayed to perfect their recognizances, the appointment remained for some time formerly incomplete. In the mean time, the plaintiff's solicitor (whether aware of the fact or not was uncertain) directed the receiver to meet

him, on a certain day, at Rainham, in Norfolk, in the neighborhood of which the estates lay, and where the tenants were to assemble for the payment of their rents; but having in the interval, after the receivers departure, ascertained the defect in his appointment, the solicitor left town himself,
[*362] the same night, for *Rainham; and on his arrival there, he interfered to prevent the tenants from paying the rents to the receiver, and succeeded in persuading them to pay the sums due from them into his own hands.

Before the recognizances were perfected, a petition was presented on behalf of the receiver, and the plaintiff who is one of his sureties, praying that the sums so received might be paid over to the petitioner, as the receiver, or that such other order might be made on the subject as the court should think fit. At the time when the petition was heard, the appointment was formally complete.

The *Solicitor General* and Mr. *Hayter*, for the petitioners.

Mr. *Stuart*, for the defendant Lord Townshend.

Mr. *Horne and* Mr. *Roupell*, for the solicitor, objected that the petition was improper in point of form: it was presented in the name of a person styling himself receiver, though he was not then regularly appointed; and it prayed that the rents might be paid over to him; whereas the regular application was, to have them paid into court. Their client also, they contended, had a right to retain the amount, in virtue of some agreement with the plaintiff Wickens; or, if no such agreement could be made out, still he was entitled to set off, against the money he had received, certain costs which were due to him from Wickens.

The Lord Chancellor:—If the court has these facts brought to its knowledge, will it refuse to correct the evil because the person praying the relief had not, at the time when he presented the petition, the character which
[*363] entitles him to that relief? *One of the petitioners is the plaintiff in the cause. It is true that the other petitioner was not clothed with the character of a receiver at the time when the petition was presented; but the prayer is, that the rents may be directed to be paid to the receiver, or to some other proper person. When the petition came on to be heard, his character of receiver was complete; and the question now is, whether the court will think it proper to direct the money to be paid to him in that capacity. It appears that he went down by the morning coach to Rainham; in the evening of the same day the plaintiff's solicitor followed by the mail, and met the petitioner, and informed him he was not entitled to receive. The tenants were on the spot, and ready to pay their rents, and the solicitor being there to receive them, it was, I think, convenient for all parties, and perhaps, under the circumstances, it was not improper, that he should receive them: but it was his duty to do so only with a view to hand them over to the officer of the court appointed for the purpose, as soon as the latter had completed his recog-

nizances. A person can have no right of lien over property which he acquires in an assumed character, or by tortious means.

Order made.

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*YARNOLD *v.* MOORHOUSE. [*364]

1830; March 24.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 G. 4, c 119,) in the usual way; and some years afterwards the testator died: held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will.

RALPH PENTON, by will, dated the 3d of December, 1814, bequeathed to his executors the sum of 5000*l.* five per cent. navy annuities, for which, by a codicil, dated the 6th of April, 1822, and confirming the will in all other respects, the like sum in three per cent. annuities was substituted, upon trust, to pay the dividends thereof to his nephew, George Penton, into his own hands only, for the term of his natural life; it being his express will and intention, that he should receive the same for the sole purposes of the maintenance and support of himself and family, and that such interest and dividends, or any part thereof, should not be in any manner liable to, or be capable of being charged with the debts and engagements of the said George Penton, and without any power to him to charge, assign, anticipate, or encumber, all or any part of such dividends and income before the same should become due and payable. And in case the said George Penton should in any manner charge, assign, encumber, or anticipate the said dividends, or any part thereof; or if the same, or any part thereof, should, by operation of law, either by bankruptcy, insolvency, or any other ways or means whatsoever, be assigned or become payable to any other person or persons whomsoever, or be or become in any manner applicable to or for any other purpose than for the prospective *maintenance and support of the said George Penton [*365] and his family, then and in such case the life estate and interest of the said George Penton, in the said bank annuities, should cease and determine, and the said executors should stand possessed of the said bank annuities, upon certain trusts, for the benefit of the said George Penton's children, as therein mentioned.

The testator died on the 17th of August, 1825.

The master found, that, on the 25th of March, 1822, George Penton, the nephew of the testator, was discharged under the act for the relief of insol-

vent debtors, having previously executed a warrant of attorney to the provisional assignee of the court for the relief of insolvent debtors; and that, in Hilary term 1829, such assignee caused judgment to be entered up on the said warrant of attorney. The master did not find that any execution had been issued on such judgment, or that the court for the relief of insolvent debtors had made any order permitting execution to be taken out upon such judgment, or put in force any power given by the said act against the property assigned by the said George Penton after his said discharge, nor had any claim bee nbrought in before him by the provisional assignee, claiming any interest in the said legacy on behalf of the creditors of George Penton. And the master did not find that George Penton had in any way charged, assigned, encumbered, or anticipated the dividends upon the said legacy, save as the same might be considered as charged, assigned or encumbered by the said warrant of attorney and judgment. And the master did not find that the same, or any part thereof, had, by opperation of law, either by bankruptcy, insolvency, or otherwise, been assigned or become payable to any other person or
[*366] persons whomsoever, or become applicable to or for any *other purpose than for the prospective maintenance and support of the said George Penton and his family.

The Vice-Chancellor having decided that George Penton's insolvency operated as a forfeiture of his life interest in the legacy of 5000*l.* stock given him by the will, and that the dividends belonged to his infant children, an appeal was now brought from that decree.

Mr. *Treslove*, and Mr. *Teed*, for the appellant:—When the testator executed the codicil of the 6th of April, 1822, he knew, or must be presumed to have known, that his nephew had taken the benefit of the insolvent debtors' act in the preceding March: what his will which for this purpose speaks either at the time of his death, or at the date of his codicil, contemplated, could only have been some future event, working a prospective forfeiture. The testator must have meant a bounty, and the words he uses, "shall be liable," import a contingency to happen after his death. No such contingency has yet occurred. Upon any other construction the legacy never vested in the father at all; and if so, it could not go over to the children. The present insolvent act (1 G. 4, c. 119) was passed long subsequent to the date of the will, which, of course, could have no reference to the provisions of that statute. The operation of the assignment made in pursuance of the act (differing materially in that respect from the policy of the law in bankruptcy) is confined exclusively to property which had, at the time of his petition, vested in the insolvent; *Hepper* v. *Marshall*;(*a*) and the right to these dividends consequently could not be in any manner affected by it. No execution could seize this property in the hands of the trustees, so that it cannot be consi-
[*367] dered as applicable *to debts within the meaning of the will. The

(*a*) 2 Bing. 372.

forfeiture can only arise, if at all, when the creditors endeavor, for the purpose of reaching the legacy, to put in motion the machinery of the act. A variety of processes must be gone through, according to the particular mode prescribed by the 30th section, which still leaves a discretion in the court to withhold or direct the payment, as it may see fit.(a) Very probably the court might refuse to make an order on the subject, for the order would immediately defeat itself; besides, there is no evidence that there are debts remaining unpaid. At any rate the creditors have not attempted to avail themselves of their powers, nor is it likely that they will try to seize upon a fund which must instantly slip from their grasp. If they did, however, the order of the insolvent debtors' court would not touch the by-gone dividends accrued due before notice. To give such an effect as the respondents contend for to the language of this will, *would be to permit the same [*368] words to bestow and take away an estate in the same breath.

Upon the general question, whether the clause in the will was sufficiently strong to render the act of insolvency a forfeiture of the life interest, the following cases were cited,—*Dommett* v. *Bedford*,(b) *Shee* v. *Hale*,(c) *Brandon* v. *Robinson*,(d) *Wilson* v. *Greenwood*,(e) *Wilkinson* v. *Wilkinson*,(g) *Ex parte Taaffe*,(h) *Cooper* v. *Wyatt*.(i)

The Lord Chancellor thought it impossible to get over the words of the will, which he remarked were very general and strong, carrying over the estate for the respondents, in the events of the bequest to George Penton "being or becoming in any manner applicable," that is, subject to be applied to the payment of his debts. He thought it could not be denied that the dividends were so applicable, if they were subject, at the discretion of

(a) By the 1 G. 4, c. 119, s. 30, it is enacted, "that in case any person or persons, body politic or corporate, shall, after the discharge of any such prisoner out of custody as aforesaid, become possessed of, or have under his or their power or control, any stock in the public funds of this country, or any legacy, money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods and chattels, or any other property whatsoever belonging to such prisoner, or held in trust for him, or for his own use and benefit, or to which such prisoner shall be in any way entitled; or in case any such person or persons, body politic or corporate shall be in any manner indebted to such prisoner, it shall and may be lawful for the said court, upon the application of any assignee or creditor of such prisoner to cause to be given notice to such person or persons, body politic or corporate, directing him or them to hold and retain the said property till the said court shall make such further order concerning the same; and thereupon it shall be lawful for the said court further to order, such person or persons, body politic or corporate, to deliver over such property and to pay such debts as aforesaid, or any part thereof, to the receiver of the said court, or to assignee or assignees of such prisoner for the general benefit of his creditors entitled to claim under such judgment entered up by order of the said court as aforesaid."

(b) 6 T. R. 684; and 3 Ves. 149. (c) 13 Ves. 404. (d) 18 Ves. 429.
(e) 1 Sw. 471. (g) 3 Sw. 515. (h) 1 G. & J. 110.
(i) 5 Mad. 482. See also *Lear* v. *Leggett*, 2 Sim. 479, where most of the other cases are referred to, and which was affirmed by Lord Lyndhurst, C. on appeal; post. [690,]

the creditors, to be charged with the payment of their debts; and he dismissed the appeal without costs.[1]

Mr. *Horne* and Mr. *Whitmarsh*, who appeared for the respondents, were not called upon to support the decree.

[*369] *Ex parte Clayton.

1830; April 1.

If an act of parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common law right.

In year the 1792, L. P. Starkie conveyed certain real estates in strict settlement, to himself for life, remainder to trustees to preserve, &c., remainder to his only son, L. G. Starkie, for life, remainder to trustees, &c., remainder to his first and other sons in tail male, remainder to the second and every other son of L. P. Starkie (the settlor,) successively in tail male, with divers remainders over. In the year 1798, a private act of parliament was obtained, which reciting the settlement of 1792, and the birth, subsequently, of L. G. P. Starkie and of L. G. N. Starkie, two younger sons of the settlor, and that it would be for the benefit of the estates and of the persons in remainder that the timber growing on the said estates should be cut, empowered the trustees therein named, and the survivor of them, with the consent of the person for the time being in possession or entitled to the rents and profits of the settled estates, under the limitations or trusts therein contained, such person having attained the age of twenty-one, or otherwise, with the consent of his guardians, to enter upon the lands, and cut the timber fit and proper to be cut; and the money produced by the sale of such timber was thereby directed to be laid out in the purchase of other lands, to be settled to the same uses.

The settlor, L. P. Starkie, died in 1807, and his eldest son, L. G. Starkie, who also had only a life interest in the settled property, died in 1822, without issue. During their lives considerable quantities of timber were felled by the trustees, and the produce invested in other lands, which were [*370] settled as the act *directed. The second son of the settlor, L. G. Starkie, in whom, on the death of his brother, the estate then vested, (he being the first tenant in tail under the settlement,) was a lunatic, and during his lunacy timber was cut and sold by authority of the committee of his estate, who was also a trustee under the act of parliament, and

[1] Vide *Whitefield* v. *Prickett*, 2 Keen, 608, 609, and n. Am. ed. *Lear* v. *Leggett*, post, 690. S. C. 2 Sim. 479, 484, n. l.

the produce, to the amount of 11,000*l.*, was paid into court. The next of kin of the lunatic now applied that this sum might be paid over to the lunatic's general personal account, while his heir at law, on the other hand, contended that it had been cut under the powers conferred by the act, and should therefore be declared to be real, or be invested in the purchase of real estate.

Mr. *Spence*, for the committee.

Mr. *Sidebottom*, for the next of kin.

Mr *Palk*, for the heir at law.

THE LORD CHANCELLOR held that the act was intended to apply only to the tenants for life under the settlement. It gave the trustees a power to cut the timber to a limited extent and in a limited way; and then, with a view to the interest of those in remainder, it provided that the produce should be invested in land and settled to the same uses; but it said nothing as to the right of the tenants in tail. It must, he thought, be confined, as was clearly the intention, to the estates of the tenants for life. To construe the act otherwise would be to carry it beyond the purpose obviously in view; for it never could be meant, there being no negative, but merely permissive words, to abridge the common law right of the tenant in tail. The produce of the timber, therefore, was to be taken as personal estate.

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*IN RE ASHLEY. [*371]

1830: April 3.

A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to about 1600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces: Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her.

A COMMISSION of lunacy, executed in January, 1829, found that Catherine Ashley was then of unsound mind, and incapable of managing her affairs. A reference was subsequently made, directing the master to inquire and state (amongst other things) of what the fortune of the lunatic consisted, and what sum would be proper to be allowed for her support and maintenance, regard being had to her circumstances and estate, and out of what fund such allowance should be paid.

By his report, bearing date the 9th of February, 1830, the master stated that the lunatic was entitled, under the will of her father, to certain real estates for life and in tail, and also, as coparcener along with her two sisters of the half blood (who were her sole next of kin,) to her undivided third part of

certain other real property in fee. And he found that the total annual value of those several estates, together with the interest of certain legacies of stock, &c. bequeathed to her by the same will, amounted to the sum of 228*l.* He also found that from the year 1798, when her father died, down till the period of her mother's death in the month of September, 1828, she had constantly resided in the family mansion, with her mother Mrs. Ashley, who had continued during the whole of that time to have the charge of her daughter and to maintain her. He further found that Mrs. Ashley, by will, dated the 14th of January, 1828, after giving divers specific bequests to persons therein named, and among the rest, legacies of 500*l.* each to her two step

[*372] *daughters, devised a freehold messuage, with fifty-seven acres of land at Coton, and all other her real estate, unto her two nieces, Elizabeth Scott and Elinor Wilson, as tenants in common in fee, they or one of them permitting the testatrix's daughter Catherine to reside with them, or one of them, and taking care of her, and managing her concerns, so long as her daughter and either of her said nieces should live: all the rest and residue of her estate and effects she gave and bequeathed to certain trustees (whom she also nominated her executors,) in the following terms:—"upon trust to receive the interest, income, and dividends which shall grow due thereon during the life of my said daughter Catherine, and to apply the same in and towards the maintenance and support and clothing of my said daughter, or otherwise, for her comfort and advantage, in such way as they my said trustees shall think proper, and without being liable to account to any person or persons whatsoever for the same or any part thereof; and from and after the decease of my said daughter, upon trust to pay the principal of the said trust moneys, and also all interest, income, and dividends which shall become due during the life of my said daughter, and not be actually applied as aforesaid"—to and for the benefit of the testatrix's three nieces, in manner therein mentioned. The master found, that the residue of Mrs. Ashley's estate amounted to about 1600*l.* a year; that an annual sum of 1200*l.* was proper to be allowed for the maintenance of the lunatic; and that the whole of that allowance ought to be paid out of the income to arise from the property to which she was entitled under her mother's will. The report also stated the affidavit of the medical gentleman who had attended the lunatic for the last five and twenty years, from which it appeared that she had continued in the same state of mental imbecility from a very tender age, and that no reasonable hope could be entertained of her recovery.

[*373] *The next of kin of the lunatic presented a petition praying a confirmation of the master's report, and the trustees under Mrs. Ashley's will presented a counter-petition, praying that the lunatic's allowance might be charged either entirely, or at least rateably, on the income of the property which she derived from her father.

The *Solicitor General* and Mr. *Whitmarsh*, for the trustees:—It is unreasonable that the whole of the allowance should be charged on the property

derived from the mother. There was clearly no intention on her part to exonerate the paternal estates from a share of the burden; and as the lunatic in the event of her recovery, would be equally entitled to enjoy both, the charge ought, in fairness to be imposed proportionally on the two funds, instead of falling wholly upon one. When Mrs. Ashley gave to her nieces (who are no relations of her step daughters) whatever might not be actually applied to the daughter's use she certainly thought she was conferring a valuable benefit upon them, and yet, according to the principle adopted by the master, they will receive but a very small surplus: and had the allowance been only a little larger, it would have swallowed up the whole, and they would have taken nothing. The effect of that construction is to enrich the lunatic's next of kin, whom the testatrix had no wish to favor, at the expense of the legatees over. The language of the will shows an intention directly the reverse: for, upon the words as they stand, if the daughter had been sane, she could not have called for the whole of the fund, but only for so much as in the exercise of a reasonable discretion, and looking to her circumstances and situation in other respects, the trustees, or the court acting in their place, *should think fit. The natural inference is, that the [*374] legacy given by the testatrix towards the support of her lunatic daughter, was only to be resorted to as an auxiliary fund, should the income from the paternal estate prove deficient for that purpose: a view which is confirmed by observing that the trustees are invested with an unlimited discretion; they are not to be accountable to any person whatsoever; and they will therefore do more than is strictly equitable, if they leave the whole or a proportional part of the burden to be borne by the other fund. Upon the true construction of the will, besides, the surplus dividends not expended in the maintenance of the daughter, are not to be paid over annually to the three nieces, but are to accumulate like the income of the paternal property, till Miss Ashley's decease, when they will of course be distributable according to the ulterior trusts. In that view, therefore, even in the event of that lady's recovery, she can sustain no possible injury; for the total amount of the saving will be the same from whichsoever source they are derived; and as between the persons who may be interested in her property after her death, there can be no preferable equity.

Mr. *Pepys* and Mr. *Crombie*, for the next of kin, contended that the sole point to be considered was what would be most for the benefit of the lunatic, looking to the possibility of her ultimate recovery. That was the principle on which the Vice-Chancellor decided in *Foljambe* v. *Willoughby*,(a) a case which had a close application to the present. The arrangement proposed by the master, by which the allowance was to be entirely paid out of the legacy ta-

(a) 2 S. & St. 165. *Rawlings* v. *Goldfrap*, 5 Ves. 440.

ken by the lunatic under her mother's will, was the most advantageous
[*375] that could *be made; since whatever part of that legacy was not applied to her maintenance, being given over in that event to others, it would be so much lost to her. By charging the whole allowance on the maternal estate, the income arising from the paternal property remained untouched, and a fund might thus be accumulated out of the savings, which, if the lunatic recovered, would form a large addition to her fortune. It was true, that if she did not recover (a possibility which the court never contemplated,) this arrangement would prove beneficial to the next of kin and detrimental to the legatees: but that was a circumstance not to be attended to; for in questions of this kind the court would not look to collateral and contingent interests, whether they were those of expectant heirs or next of kin, or legatees over, who were all left to take their chance alike. If, however, any favor were to be shown, it ought rather to be shown towards those who were nearly related to the lunatic, than to strangers. As to the supposition that the savings of the maternal estate might accumulate so as to form an available fund in case the lunatic should recover; these would not, like the savings of the other fund, be her own to deal with as she pleased; they could only be applied towards her support and clothing, and would not be disposable by her will. The trustees could have no right under the words of the will to withhold any part of the fund from the daughter, whether lunatic or sane, provided it could be properly applied for her benefit; nor would the words relied upon exempt them from accounting.(a) The bequest being "towards" her daughter's maintenance, was a proof that the testatrix thought it might not
[*376] be adequate, and *that, instead of being auxilliary, it was intended to be the primary fund.

The *Solicitor General*, in reply.

The Lord Chancellor:—I think the testatrix intended that this fund should be applied, in the first instance, for the maintenance, support, and clothing of her daughter;—it might turn out eventually that it was not a sufficient provision, which would explain the use of the word "towards;"—and if there was any surplus, she gave it to the legatees over. Under these circumstances, it being for the interest of the lunatic, and not contrary to the intention of the will, I am of opinion that the charge should be wholly borne by the maternal estate.[1]

(a) Upon this point see *Hillier* v. *Hillier*, 2 Freem. 110. *Gibbons* v. *Dawley*, 2 Chan. Ca. 198. *Hamley* v. *Gilbert*, Jac. 254, and *Thurston* v. *Essington*, ib. 361, n.

[1] The governing principle in the management of the estate of a lunatic, is the lunatic's interest, not that of those who may have eventual rights of succession; therefore real property has been allowed to be converted into personal; and timber growing on the land to be cut down and sold." *In the matter of Salisbury*, 3 Johns, Ch. Rep. 347. But there may be a difference in the case of an idiot. Walworth Ch., referring to *In re Ashley*, said; "That was a case of lunacy, in which there was a possibillity of recovery; so that the application of the bequest for the support

of the daughter would, in the event of such recovery be most beneficial for her. But in the case of an idiot, where there is no possibility of his being benefitted by the increase of his property beyond what is sufficient so ensure him an ample support for life, the principle upon which Sir John Leach acted in the case of *Foljambe* v. *Willoughby*, does not apply." *King* v. *Strong*, 9 Paige, 99. In *Foljambe* v. *Willoughby*, 2 Sim. & Stu. 165. Leach V. C. held, that where there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied.

END OF PART II.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

WATKINS *v.* LEWIS.[1]

ROLLS.—1830; February 24, 25, March 9.

Where the husband purchases an estate, but the whole consideration is paid by the sister of the wife, upon condition that the estate be settled to the use of the husband and wife in tail, there the case, though within the letter of the statute of the 11 Hen. 7, c. 20, is not within the equity of the statute: and the alienation of the wife, after the death of the husband, is valid.

THE question in the cause was, whether an estate tail, which had been vested in Philadelphia Watkins, by a settlement executed by her husband after marriage, was within the meaning of the 11 Hen. 7, c. 20, and 32 Hen. 8, c. 36, an estate tail in lands "of the inheritance or purchase of the husband," so as not to be barred by a fine, which she levied after her husband's death.

By articles of agreement under seal, dated the 29th of March, 1754, between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part, Elizabeth Hughes and Lætitia Hughes, in consideration of the sum of 2480*l.* 10*s.*, covenanted and agreed with Watkins, his heirs and assigns, that they, Elizabeth Hughes and Lætitia Hughes, and the heirs of Lætitia, would, at the costs of William Watkins, on or

[*378] *before the 24th day of June, then next, well and sufficiently convey and assure unto William Watkins, his heirs and assigns, or to such other person and persons, and to such other uses, as William Watkins, his heirs and assigns, should direct and appoint, certain lands, tenements, and hereditaments in the county of Monmouth, called Gelly Vaur, Gelly Vach, the Pant Farm, and the Packhorse, together with some other premises situate in the same parish: and further, that they, Elizabeth Hughes and Lætitia Hughes, would, before the execution of such conveyance, pay unto Elizabeth Lucas, or her assigns, the mortgage then due on the said premises, and procure her to join in conveying the lands to Watkins. On the other hand, William Watkins, for himself, his heirs and assigns, promised to pay unto Eliza-

[1] S. C. Taml. 447.

beth Hughes and Lætitia Hughes the sum of 2480*l.* 10*s.* at or immediately before the execution of the conveyance.

By indentures of lease and release, dated the 28th and 29th of January, 1755, made between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part,—after reciting that Watkins had contracted for the absolute purchase of the before mentioned premises, at the price of 2480*l.* 10*s.* that it had been agreed between the parties, that he should receive the rents from the 24th of the preceding June, and should from that day keep down the interest on Lucas' mortgage; that he had accordingly been in possession from the 24th of June; that Elizabeth Hughes and Lætitia Hughes had paid the interest on the mortgage down to that day, but that the principle sum of 1500*l.* still remained due, which Watkins was to pay with part of the purchase money, and that the residue, being 980*l.* 10*s.*, was to be paid to the vendors,—they, Elizabeth Hughes and Lætitia Hughes, in consideration of the sum of 980*l.* 10*s.*, conveyed the property to Watkins, his heirs and assigns; and they covenanted that they were seised *of the premises in fee simple, free from incumbrances except [*379] the mortgage for 1500*l.*

A receipt for 980*l.* 10*s.* was endorsed on the deed of release.

By an indenture dated the 25th of April, 1755, between William Watkins and Philadelphia his wife of the first part, and Ann Constable, described as sister in law of Philadelphia Watkins, of the second part, and Thomas Symonds of the third part,—after reciting that, by the deeds of the 28th and 29th of the preceding January, the premises therein comprised had been conveyed to Watkins and his heirs, subject to the mortgage of 1500*l.*, and that such purchase was agreed for and made by Watkins, with the approbation of the said Ann Constable, who gave and advanced him the said 980*l.* 10*s.* upon condition that such estate and premises should be settled and conveyed to the uses thereafter mentioned,—Watkins conveyed the property to Symonds and his heirs, to the intent that Ann Constable should, subject to the mortgage for 1500*l.*, receive thereout a rent charge of 30*l.* per annum for her life; and, as to the fee and inheritance, subject to the mortgage and rent charge, to the use of Watkins and Philadelphia his wife, for their lives and the life of the survivor, without impeachment of waste for the life of William Watkins; with remainder to the use of the heirs of the body of Philadelphia by Watkins; with remainder to the use of the right heirs of Watkins: and he further covenanted that he had done no act to incumber the premises.

In 1758, 1600*l.* being due on the mortgage, Ann Constable paid it off; and by indentures of lease and release, dated the 24th and 25th of June, 1758, the mortgagees conveyed the premises to her and her heirs, as a security for that sum. Watkins and his wife were parties *to the release; [*380] and he covenanted for himself and for her to pay the mortgage money and interest.

By deeds of lease and release, dated the 6th and 7th of May, 1760, Watkins,

in consideration of the arrears of the annuity of 30*l.* and of the interest on the mortgage then due to Ann Constable, and of her agreeing to pay sums to the amount of 900*l.* for which she was then his surety, conveyed the lands and hereditaments to her and her heirs, subject to the estate and interest of Philadelphia, and the heirs of her body.

William Watkins died in the lifetime of his wife, leaving several children of the marriage him surviving. Edward, the eldest son, died in his mother's lifetime, and without issue. John, the second son, also died in the life of his mother, but leaving two daughters, the present plaintiffs, who, upon the death of Philadelphia, which happened in 1823, were the heirs of her body.

After the death of William Watkins, Philadelphia Watkins, with the concurrence of devisees and executors of Ann Constable, who had died previously, sold various parts of the property, and conveyed them to the purchasers, who entered into possession of the rents and profits. A fine had been levied in the 18th of G. 3, by Edward Watkins, the eldest son, by means of which it was supposed that a good title had been made; but as Philadelphia was not a party to the fine, and Edward, who levied it, was only heir in tail expectant on the death of his mother, and had not then, and did not live to acquire, any estate or interest in the premises, that fine proved inoperative. To remedy the defect, Philadelphia, in the 3d of G. 4., levied a fine for the purpose of barring her estate tail, and of effectually vesting the lands and hereditaments in the several persons to whom they had been conveyed.

[*381] *The bill was filed by the daughters of John Watkins, claiming to be entitled as heirs of the body of Philadelphia, against the several persons, who, under the conveyances from Philadelphia, had acquired interests in the lands and tenements comprised in the deeds of January, 1755. It charged that the whole of the interest of the mortgage debt, and a considerable part of the principal, had been paid and satisfied by the receipt of the rents and profits; that the estates were derived from William Watkins the husband; and that the fine levied by Philadelphia was wholly inoperative to bar her estate tail, inasmuch as the plaintiffs, who were at that time the heirs in tail expectant on her death, were not parties to it, and were not consenting to it.

The defendants,(*a*) by their answers, stated, that the purchase was made by William Watkins, with the approbation and on the behalf of Ann Constable, who was the daughter of the father of Philadelphia Watkins by another mother; that Ann Constable advanced to William Watkins the purchase money, upon condition that the lands should be conveyed to the uses declared by the indentures of the 24th and 25th of April, 1755; and that in pursuance of that condition the lands were conveyed to those uses. They submitted, therefore, that the lands were derived from Ann Constable and not from

(*a*) The argument and judgment on a plea put in by some of the defendants, and which was decided on a point of form, are reported in 2 Sim. & Stu. 590.

William Watkins, and that, consequently, the estate limited to the wife was not a settlement *ex provisione viri*, within the meaning of the 11 Hen. 7, c. 20.

Mr. *Bickersteth*, Mr. *Preston*, and Mr. *Jacob*, for the plaintiffs:—

The 11 Hen. 7, c. 20, enacts, "That, if any woman *which hath [*382] been, or hereafter shall have any estate in dower, or for term of life, or in tail, jointly with her husband, or only to herself, or to her use, in any manors, lands, tenements, or other hereditaments *of the inheritance or purchase of her husband*, or given to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or by any other person seised to the use of the said husband or of his ancestors, and have or shall hereafter, being sole, or with any other aftertaken husband, discontinued or discontinue, aliened, released, or confirmed, aliene, release, or confirm, with warranty, &c., all such recoveries, discontinuances, alienations, releases, confirmations, and warranties so had and made, and from henceforth to be had and made, be utterly void and of none effect." And it is afterwards provided, that the act "extend not to any such recovery or discontinuance to be had where the heirs next inheritable to the said woman, or he or they, that next after the death of the same woman should have estate of inheritance in the same manors, lands, or tenements, be assenting or agreeable to the said recoveries, where the same assent and agreement is of record or inrolled." Our propositions are, that the lands, of which Philadelphia Watkins levied the fine, were lands of the purchase of her husband: that the heirs next inheritable to her did not assent to that fine; and, therefore, that it was "utterly void and of none effect."

By the articles of March, 1754, William Watkins covenanted for the absolute purchase of the lands; and the vendors covenanted to pay off the mortgage to which the lands were subject. The conveyance in January, 1755, recited the agreement to purchase the fee simple at the price of 2480*l.* 10*s.*, and carried the contract into effect; but as the vendors had not paid off the mortgage, the purchaser retained the amount of the debt, and took *upon himself the responsibility of discharging the incumbrance. [*383] He was the purchaser of the entire fee simple; part of the price he paid; the remainder of the purchase money, namely, the mortgage debt, he became bound to pay. Thus, in April, 1755, the lands were "of the purchase of the husband;" and the settlement then made, which gave the wife an estate tail in them, was a settlement of lands of the purchase of the husband. At the time of the execution of the settlement, the estate was in him; and it was from him that the settlement transferred it. If he had paid off the mortgage, could a doubt have been raised as to the question now agitated? and what difference is there, for the present purpose, between paying and becoming bound to pay?

It is true that 980*l.*, part of the purchase money, was advanced by Ann Constable, a relation of the wife; but that did not make the contract hers,

or entitle her to claim the estate. In *Symson* v. *Turner*,(a) the wife joined with the husband in barring an estate tail, which she had in lands of the yearly value of 400*l*., and a new settlement was made under which she took an estate tail in a part of the lands of the value of only 150*l*. a year: thus she was, by parting with her former estate tail, a purchaser of the latter estate tail; she had given up the whole in order to have a part resettled: yet the estate limited to her under the second settlement was held to be *ex provisione viri*, and to be within the statute. In *Kinaston* v. *Loyd*,(b) the husband and wife sold the wife's lands, and laid out the money in the purchase of other lands, which were conveyed to the husband and wife; and though the whole of the purchase money arose from the
[*384] wife's property, it was held that the purchased *lands were within the statute. In *Stockbridge's case*,(c) the husband, for money paid by him, procured the freehold of copyholds, of which he and his wife were seised in fee, to be conveyed to him and his wife, and the heirs of their bodies; the wife afterwards suffered a recovery of the lands; and this recovery was held to be void against the heir. In *Piggot* v. *Palmer*,(d) lands purchased for 160*l*., of which 140*l*. was paid by the wife's father, were conveyed to the husband and wife, and the heirs male of their bodies; and her estate was held to be within the statute. The same construction was adopted in *Kirkman* and *Thompson*,(e) where, in consideration of 200*l*. paid by the wife's father and of the marriage, the father of the husband conveyed lands to the use of the husband and wife and the heirs of the wife: yet there part of the value of the lands must be considered as having moved from the wife's family. *Villars* v. *Beamont*.(g)

If the lands of which Philadelphia Watkins levied a fine, were, within the meaning of the statute, lands of the purchase of her husband, the only other question is, whether the heirs next inheritable to her assented to the fine? The plaintiffs were such heirs in expectancy, when she levied the fine, and such heirs, *de facto*, at the time of her death: and it is not alleged that they ever assented. The ineffectual fine levied by Edward Watkins in the 18th of G. 3, when he was next heir, could not give validity to the fine which his mother levied more than forty years afterwards. *Seymour's case* (h)

They were entirely distinct and independent proceedings, and could
[*385] be connected with each other so as to *form part of one and the same transaction; a circumstance which distinguishes this case from *Doe* v. *Whitehead*.(i) *Selwyn* v. *Selwyn*.(k) The assent, which the statute requires, must be an assent to the very recovery or discontinuance by

(a) 1 Eq. Cas. Ab. 220, and Vin. Ab. xiv, 555, pl. 25. The cases on this point are collected in Viner's Ab. vol. xiv. under the title "Jointress and Jointure."

(b) Palmer, 217, Vin. Ab. xiv. 554, pl. 22.
(c) Cro. El. 24, Vin. Ab. xiv. 549, in margin.
(d) Moore 250, Vin. Ab. xiv. 551, pl. 5.
(e) Cro. Jac. 474, Vin. Ab. xiv. 554, pl. 21.
(g) Dyer, 146, Vin. Ab. xiv. 550, pl. 3.
(h) 10 Rep. 95.
(i) 2 Burr. 704.
(k) 2 Burr. 1131.

which the lands are aliened, and by the person who is at the time heir. No assent, which would satisfy the requisition of the statute, could be given by Edward Watkins, in 1778, to a fine which was not levied till 1822, long after his death, and when other persons were the heirs next inheritable. *Mackwiliam's case.*(a) *Herring* v. *Brown.*(b)

Mr. *Tinney* and Mr. *Wrottesley*; Mr. *Treslove* and Mr. *Duckworth*; Mr. *Pemberton* and Mr. *Turner*, for the several defendants.

In *Eyston* v. *Studd*,(c) a husband and wife, seised in right of the wife, levied a fine to a third person, who rendered the land back to the husband and wife and the heirs of their bodies; a fine levied by the wife after the death of her husband was held not to be within the operation of the statute, although the lands were, within the words of the act, of the purchase of the husband by the first fine:(d) "the intent of statutes being more to be regarded and pursued than the precise letter of them; for often times things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the act; and the best way to construe an act of parliament is according to the intent rather than according to the words. And the intent of the statute of 11 Hen. 7, was to restrain women who had joinstures which proceeded originally from their husbands, or from the ancestors of their husbands, from *disinheriting or doing other injury to the heirs of their hus- [*386] bands. Wherefore a man ought not to rest upon the letter of an act." Referring to the same case, Lord Coke observes,(e) "this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning." So here, the lands in question were the purchase of the husband in letter only, and not in meaning: he purchased nothing but the equity of redemption; he settled nothing but the equity of redemption; and every shilling that was paid for the equity of redemption came from the wife's sister of the half blood. There never was any estate in him, which he was at liberty either to settle or not. It is evident from the recitals of the deeds of April, 1755, that he was, from the first, a trustee, for the purposes of the proposed settlement, of the only estate which he at any time had in the lands; and Ann Constable, as soon as the estate was conveyed to him, might have filed a bill to compel him to execute a settlement pursuant to the terms of the agreement, on the faith of which she had advanced the purchase money. How can lands be considered to have been substantially the purchase of the husband, or to have proceeded from him, when the money, with which they were bought, was furnished by the wife's relation, and furnished on an express agreement, that the lands should not

(a) Hob. 332.
(b) 1 Ven. 368. 2 Shower 185.
(c) Plowden, 459. Vin. Ab. xiv. 551, pl. 4
(d) Plowden, 464
(e) First Institute, 366, a.

remain the property of the husband, but should be conveyed upon certain trusts for the benefit of the wife and the heirs of her body?

The statute does not apply, if the settlement be made by a stranger, *Ward* v. *Walthew*;(*a*) much less, if the property be derived, as is [*387] the case here, from the wife or *her relations; nor does it make any difference that the husband pays a sum of money to the relations of the wife from whom the settlement proceeds. *Copeland* v. *Piatt*.(*b*) Here there is still less question, for no part of the purchase money was advanced by the husband.

It has been argued that part of the consideration for the conveyance is to be considered as having moved from William Watkins; because, as between him and the vendors, he became liable to pay the mortgage. But the settlement extended only to the equity of redemption, and not to the estate discharged of the mortgage. If he had paid off the mortgage, the security would have been transferred to him, and he would have held it for his own benefit. He had an indemnity on the estate itself for all that he might pay in satisfaction of the mortgage: whatever he might so pay would be a consideration for which he would acquire an interest paramount to the settlement of April, 1755; and, consequently, the making of such payments, and still more the liability to make them, could not be any part of the consideration for that interest which was comprised in the settlement.

The cases cited on behalf of the plaintiffs do not bear out the proposition for which they contend. In *Symson* v. *Turner*, the estate, which the wife parted with, was acquired under a settlement made by the husband, and was *ex provisione viri*; all that the second settlement did was to substitute an estate tail in lands of 150*l.* a year for an estate tail in lands of greater value: the wife relinquished a settlement of lands which were of the purchase or inheritance of her husband for a settlement of part of the same lands: [*388] the first settlement being within the statute, the second also was *necessarily within it. *Kinaston* v. *Lord* proceeded on the principle, that the money arising from the sale of the wife's lands vested absolutely in the husband: so that the estate, purchased with it, was to be considered as paid for by him alone. The decision in Stockbridge's case rested on the ground, that the copyhold was completely extinguished by the enfranchisement, and that the only estate which the heir claimed was that freehold which the husband had purchased and paid for. In *Piggott* v. *Palmer* the transaction took place before marriage; the father of the wife paid the 140*l.* in consideration of the marriage and of the settlement: and the husband was by the marriage the purchaser of the wife's portion. The same observations apply to *Kirkman* v. *Thompson*, with this difference only, that there the

(*a*) Cro. Jac. 153, Vin. Ab. xiv. 554, in margin.
(*b*) Jo. 254. Cro. Car. 244, Vin. Ab. xiv. 551, pl. 6.

money was paid, not to the husband but to the husband's father. In cases of that description the money which proceeds from the wife, or her relations, cannot be considered as part of the price of the estate which is brought into settlement: it is paid in consideration of the marriage.

Mr. *Bickersteth*, in reply, cited *Hawkins* v. *Kemp*,(a) in support of the position that the fine levied by Edward Watkins could not be deemed an assent to the fine subsequently levied by his mother.

March 9.—The Master of the Rolls:—In this case, a woman, seised in tail of certain lands under a settlement to which the husband was a party, alienates those lands after the death of her husband: and the material question in the cause is, whether these lands are, within the statute of the 11 Hen. 7, c. 20, **ex provisione viri?* Being of opinion that these [*389] lands are not within the intent of the statute, it is not necessary for me to state more of the facts of this case than are necessary to explain the reasons of my judgment.

By deeds of lease and release of the 28th and 29th of January, 1755, between Elizabeth Hughes and Lætitia Hughes of the one part, and William Watkins of the other part,—after reciting that William Watkins had agreed to purchase the lands in question for a sum of 2480*l.* 10*s.* and had entered upon the possession on the 24th of June then last past, and was from that day to pay interest on a mortgage of 1500*l.* stated to be charged on the said lands, and was to pay the principal of the mortgage out of the said purchase money of 2480*l.* 10*s.*,—the same premises, in consideration of the sum of 980*l.* 10*s.* being the residue of the purchase money, were, by Elizabeth Hughes and Lætitia Hughes, conveyed to William Watkins, his heirs and assigns, to the only proper use and behoof of William Watkins, his heirs and assigns for ever.

By an indenture of settlement bearing date the 25th day of April, 1755, made between William Watkins and Philadelphia his wife, of the first part; Ann Constable therein stated to be the sister in law, but in fact being sister of the half blood, of the said Philadelphia, of the second part, and Thomas Symonds of the third part,—after reciting the effect of the indenture of release of the 29th of January, 1755, and that such purchase so made by William Watkins was agreed for and made by him with the approbation of Ann Constable, who advanced him the sum of 980*l.* 10*s.* the consideration money for the purchase thereof, upon condition that such estate and premises should be settled and *conveyed to the uses thereinafter expressed— [*390] it was witnessed that the said lands were thereby conveyed to the said Thomas Symonds, to the end, intent, and purpose that the said Ann Constable might thereout receive an annuity of 30*l.* for and during the term of her natural life, and subject thereto, and to the said mortgage sum of 1500*l.*,

(a) 3 East, 410.

to the use and behoof of the said William Watkins and Philadelphia his wife, for and during the term of their natural lives, and the life of the survivor of them, without impeachment of waste during the life of William Watkins only, and from and after the decease of the survivor of them, to the use of the heirs of the body of the said Philadelphia by the said William Watkins lawfully begotten, and in default of such issue to the use and behoof of the right heirs of William Watkins; and William Watkins thereby covenanted that he had done no act to charge or incumber the premises. This, therefore, is a settlement, not of the lands therein mentioned, but of the equity of redemption of those lands only, subject to the annuity of 30*l.* per annum to Ann Constable, and subject to the mortgage of 1500*l.* and interest. If William Watkins had afterwards paid this mortgage money, he was at liberty to keep the mortgage on foot for his own personal benefit, and as against all persons claiming under the settlement. The whole consideration of the settled property was paid by the sister of the wife; and though, within the letter of the statute of 11 Henry 7, this may be considered as a purchase by the husband, yet it is not a case within the equity of the statute; the husband being, in his character of purchaser, merely the instrument of the wife's sister, and having made no provision whatever for the wife or her issue.

I fully adopt the principle of those authorities in which it is held that, where an estate is settled partly in consideration of the marriage, and [*391] partly in consideration *of money paid, the consideration of marriage will prevail,[1] and will bring the case within the statute: but these authorities have no application to this case.

The bill must be dismissed, and must be dismissed with costs.

Palmer *v.* Scott.

Rolls.—1830; March 1.

The written undertaking of one party will be enforced, although the other party is not mutually bound by writing.

Hampson had received and disbursed moneys as the solicitor and agent of the plaintiff Palmer; and in 1822, on the occasion of the sale of the farm, called Farley, belonging to the latter, the purchase money, amounting to upwards of 3000*l.* came into the hands of Hampson.

On the 23d of December, 1822, Hampson wrote to Palmer in the following terms:—"I have great pleasure in informing you that the Farley purchase is now finally settled. I have on the other side sent you the particulars, with the balance paid to me, amounting to 3261*l.* 15*s.* I will endeavor to obtain, very soon, a security for this sum; but if I should not be successful, I will

[1] Vide *Maguiac* v. *Thompson*, 1 Baldw. 344.

transfer to you a mortgage to pay you 4*l.* per cent. for the interest of the money until it is invested." In a letter of the 14th of April, 1823, Palmer complained that he had received no document to show what had become of the purchase money of Farley, and pressed for a statement of his account. Hampson, in reply, stated that he would be in London shortly after Whitsuntide, when he would bring with him a security for 3000*l.* and settle the balance.

In June, Mr. Palmer again pressed for a settlement; and on the 17th of June, Hampson answered as follows :—"I will in a few days [*392] make out a statement of the account, with a remittance for the balance, and an acknowledgment that I have in my hands a mortgage deed for 3000*l.*, with an undertaking to assign it to you when required. This, I trust, will be satisfactory for the present." On the 15th of July, Hampson again wrote to Palmer, saying,—"I have on the other side sent you an acknowledgment of having the security of 3000*l.* and a draft for 361*l.* 15*s.* viz. 261*l.* 15*s.* being the balance received of Mr. Crawley, in December last, and 100*l.* on account of the timber."

The acknowledgment was in the following words :—"15th July, 1823. I acknowledge to have in my hands a mortgage deed made by Thomas Nicoll to me, of an estate at Studham in the county of Bedford, for securing the sum of 3000*l.* and interest; and having received this sum of John Sharpe Palmer, Esq. in December last, I do hereby undertake, when thereto required by him, to execute a transfer of this mortgage to him.

"Leonard Hampson."

Mr. Palmer's answer was dated on the following day, and was in these words :—"I have this moment received your obliging letter, enclosing a draft on Sir John Perring, Bart., Shaw, Barber, & Co. for 361*l.* 15*s.* I shall be truly glad to receive a statement of debtor and creditor, which you kindly promise to send on your return home, as I do not know how to arrange my accounts till our affairs are settled."

On the 9th of August Mr. Palmer wrote to Mr. Hampson as follows :—"I have received this morning a letter from my solicitor at Chelmsford, informing me that he has entered into an agreement for the purchase of a small farm contiguous to mine in Essex, which my friends have recommended as particularly advantageous to the little property I possess there. [*393] It is therefore become absolutely requisite to arrange my affairs with you, for which purpose I intend coming to Luton either the latter end of next or the beginning of the week following, when I hope it will be convenient to you to give me an hour or two some morning, that I may discharge my debts, and may be enabled to form an idea what money I shall have at my disposal."

This letter was followed by another, dated the 13th of August, which was in these words :—"As I have not received any answer to my letter of Friday last, I conclude you are from home, &c. &c. I shall not have 3000*l.* to put out on mortgage, as I shall want 1000*l.* to pay for my late purchase about the

middle of September. I depend upon this, as the 3000*l.* was left in your hands as a temporary arrangement, agreeable to your desire."

Hampson died insolvent, without having paid the 3000*l.* to Mr. Palmer, and without having assigned the mortgage. The bill was filed against his representatives to compel an assignment of the mortgage, pursuant to his undertaking of the 15th of July, 1823.

Mr. *Treslove* and Mr. *Rawlins*, for the plaintiff:—The letter of the 15th of July contains an express undertaking by which Hampson was bound, unless Palmer rejected it. Far from rejecting it, Palmer expresses himself satisfied with the communication, retains the undertaking, and acquiesces in the arrangement. It is true that he shortly afterwards presses Hampson for a settlement of accounts, and states that he would not have the 3000*l.* to lay out on mortgage, as he would want 1000*l.* to complete a purchase which [*394] he had made. But *all this is perfectly consistent with his having acceded to Hampson's undertaking to hold Nicoll's mortgage as a security for the debt due to him, Palmer. Hampson and Palmer had other pecuniary dealings besides the transaction as to the 3000*l.* There was no intention on either side that the money should remain permanently in Hampson's hands; the arrangement was merely temporary: Palmer might at any moment call in the whole or any part of the money in Hampson's hands: but so long as any part of the money remained with Hampson, Nicoll's mortgage was to be a security for it.

Mr. *Bickersteth* and Mr. *Barber*, contra:—The acknowledgment inclosed or contained in the letter of the 15th of July, was merely a proposal; and in order to constitute an agreement, there ought to have been an acceptance of it in writing, on the part of Palmer. An agreement is not perfect till both parties are bound; here Palmer never was bound; and he never considered himself bound. The offer made to him was, that he should become mortgagee of Hampson's interest in a mortgage; to that offer he never acceded; on the contrary, before four weeks had elapsed, he was pressing Hampson for a settlement of accounts, and payment of the money.

The Master of the Rolls:—Where there is a proposal merely, it must, to constitute an agreement, be accepted by writing:[1] but here it is not a proposal, but an express undertaking, which this court, will compel the party signing it specifically to perform, although the other party has not bound himself by writing.[2]

[1] As to agreement by letter, see *Frith* v. *Lawrence*, 1 Paige, 434. *Brisben* v. *Boyd*, 4 Paige, 17. *Thomas* v. *Dering*, 1 Keen, 729, 740, and note Amer. ed. *Holland* v. *Eyre*, 2 Sim. & Stu. 194. *Morton* v. *Tewart*, 2 Yo & Coll. C. C. 67.

[2] In order to establish the validity of an agreement in a court of equity, it is not necessary to show that it was binding on both parties at the time of its being signed; it is sufficient if an agreement signed by one party be afterwards accepted and acted upon by the other. *Dowell* v. *Dew*, 1 Yo. & Coll. C. C. 345. *Thornbury* v. *Bevill*, id 554. *Ballard* v. *Walker*, 3 Johns. Cas. 60. *Sutherland* v. *Brigge*, 1 Hare, 34. *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. Rep. 282. *Benedict* v. *Lynch*, id. 370.

*Green v. Spicer.[1] [*395]

Rolls.—1830; March 2.

Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that cestui que trust during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund.

Robert Pinning the elder, by his will, devised certain real estates to John Spicer and Daniel Robertson, and their heirs and assigns, "upon trust to let and manage the same, and receive the rents, issues, and profits thereof, and to pay and apply the same rents, issues, and profits to or for the board, lodging, maintenance, and support, and benefit of my son Robert Pinning at such times and in such manner as they shall think proper, for and during the term of his natural life; it being my wish that the application of the rents and profits for the benefit of my said son may be at the entire discretion of the said John Spicer and Daniel Robertson, and the survivor of them, and the heirs and assigns of such survivor, and that my said son shall not have any power to sell or mortgage, or anticipate in any way the same rents, issues, and profits, or any rents, issues and profits, dividends or interests, derived under this my will."

Robert Pinning the younger had taken the benefit of the act for the relief of insolvent debtors; and the bill was filed by the assignee, praying that he might be declared entitled to the rents and profits of the devised hereditaments during the life of Robert Pinning the younger.

Mr. *Bickersteth* and Mr. *Girdlestone*, junior, for the plaintiff:—The mode of applying the income for the son's benefit is in the discretion of the trustees; but they have no *power to withhold it from him, or to [*396] apply it otherwise than for his benefit; therefore, he takes a life estate in this property: and there is no clause in the will which makes his interest determine, in the event of his attempting to assign or incumber it, or of his becoming a bankrupt or insolvent. The son being thus tenant for life of the property, the proviso which declares that he shall not have power to sell, mortgage, or anticipate the income, will not prevent his life estate from passing to his assignee. *Graves* v. *Dolphin*,(*a*) *Brandon* v. *Robinson*.(*b*)

Mr. *Agar* and Mr. *Parker*, contra:—The son can claim nothing under the will, except through the discretion of the trustees. He could not have compelled them, through the interposition of this court, to have paid him over any part of the rents, if they, in the honest exercise of their discretion, thought that it would be for his benefit to keep the income of this property for some time out of his control; and the assignee cannot have a better right

(*a*) 1 Sim. 66. See also 1 Swanston, 481, n. (*b*) 1 Rose, 197. 18 Ves. 429.

[1] S. C. Taml. 396.

than the insolvent himself would have had. The interest of the son is only a species of possibility, which will not pass to an assignee: *Thomas* v. *Freeman*.(a). If the assignee is entitled, the discretion of the trustee is at an end; that is, an essential part of the devise is annihilated.

THE MASTER OF THE ROLLS:—The question in the cause is, whether the testator's son Robert Pinning takes any estate or interest under the will, other than by the exercise of the discretion of the trustees.

[*397] *Robert Pinning takes a vested life estate of which the trustees cannot deprive him by any exercise of their discretion: they are bound to apply the rents, issues, and profits for the benefit of Robert Pinning, and their discretion applies only to the manner of the application.

Decree for the plaintiff.[1]

MATTHEWS *v.* MAUDE.

ROLLS.—1830; March 8.

A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8750*l.* The testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7000*l.* The court decreed, that the 8750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother.

THE residuary clause in the will of John Crozier, Esq., was in the following words:—"All my remaining moneys and securities for money, either in the public or company's funds, or money on mortgages, or other security, and all my property of what nature and kind soever and wheresoever, I give and bequeath to my sister, Elizabeth Crozier, during her natural life, yet, so that she shall have powers to call in the whole or any part of that property,

(a) 2 Vernon, 563.

[1] So, where a testator bequeathed a legacy of 400*l.* to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner, as they should, in their judgment and discretion think best; it was held that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent. *Piercy* v. *Roberts*, 1 Myl. & K. 4. But, where a testatrix bequeathed a share of her residuary estate in trust for her nephew for life, and by a codicil, after reciting that her nephew had become a bankrupt and insane, directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner for the maintenance and support of her nephew, and for no other purpose whatsoever, as they in their discretion should think most expedient; it was held that the nephew's assignees were not entitled to any portion of the provision made for him. *Twopeny* v. *Peyton*, 10 Sim. 487. Much reliance seems to have been placed, in that case, upon the use of the words "maintenance and support." See further *Lear* v. *Leggett*, post, 690, 694, and note ibid. *Whitfield* v. *Prickett*, 2 Keen, 709, and n. ibid. *Lewes* v. *Lewes*, 6 Sim. 304. *Lord* v. *Bunn*, 2 Yo. & Coll. C. C. 98.

and to place out the same again either in government, bank, or South Sea annuities, or in security on land. And I moreover give to my said sister Elizabeth, and to her heirs and executors, the whole or any part of my said residuary property, on condition that she shall and do, by a will in writing duly executed by her, dispose of such whole or such part; but if she shall decline or forbear to make such a disposition by written will, then I direct that the whole or such part of said residuary property so undisposed of by my said sister shall, on her demise, be divided into four equal portions or parts: two of these parts shall be given to my nephew John Crozier; one other part I give to my brother Joseph Crozier, and the remaining part shall be equally divided among my sister Robinson's sons and daughters, or their legal representatives."

*The testator died in 1806. He appointed John Mitchinson [*398] and Philip Wyatt his executors. Mitchinson alone proved the will.

The testator at the time of his death had 7000*l.* bank stock, which formed a part of his residuary property. The residue of the personal estate and effects of the testator, exclusive of this sum of bank stock, consisted of 4000*l.* three per cent. reduced bank annuities, and 34,818*l.* 2*s.* 8*d.* three per cent. consolidated bank annuities. These stocks were transferred into or entered in the name of Mitchinson, and afterwards of Mitchinson's executors.

By the 56 G. 3, c. 96, which came into force on the 26th of June, 1816, it was enacted, "that, in consideration of the advance of 3,000,000*l.* for the public service, the capital stock of the governor and company of the bank of England should be increased and extended from the sum of 11,642,400*l.* of which the same then consisted, to the sum of 14,553,000*l.*, making an increase or addition of 2,910,600*l.* capital stock; and that the sum of 2,910,600*l.* capital stock should be appropriated and divided amongst the several persons, bodies politic and corporate, who were proprietors of bank stock on the 23d of May, 1816, at the rate of 25*l.* for every 100*l.* of bank stock, which such persons, bodies politic and corporate, were then respectively proprietors of, or had standing in their respective names in the books kept by the governor and company for the entry and transfer of such stock, and so in proportion for a greater or lesser sum: and that such division and appropriation should be placed to the credit of the respective names of such persons, bodies politic and corporate, in the books of the governor and company accordingly; and that all such persons, bodies politic and corporate, should, from the *time of such division and appropriation, be lawful- [*399] ly entitled to the additional sum of bank stock so placed in or to the credit of their respective names, and respectively be entitled to be paid the same rate of dividend thereon, and to possess and enjoy the same profits, privileges, and advantages in respect thereof, in like manner to all intents and purposes as they were entitled to be paid, possess and enjoy, in respect

of the bank stock which stood in their respective names on the 23d of May, 1816."

In pursuance of this act, the sum of 7000*l.* bank stock, which formed part of the residue, was increased to 8750*l.*; and the additional 1750*l.* was, on the 29th of June, 1816, entered in the books of the bank of England in the names of the executors of Mitchinson.

The sister, Elizabeth Crozier, made her will on the 16th of July, 1816, *inter alia*, in the following words :—" And as to all such moneys as now constitute the residue of the personal estate of my said late brother, John Crozier, and which, by virtue of his will, I am enabled to will and dispose of, consisting of 7000*l.* bank stock, 4000*l.* 3 per cent. reduced bank annuities, and 34,818*l.* 2*s.* 8*d.* or thereabouts, 3 per cent. consolidated bank annuities; and as to all my own moneys, goods, chattels, and personal estate and effects whatsoever or wheresoever, after payment of my debts and legacies and testamentary and funeral expenses, and subject thereunto, I do hereby, in exercise of every power in me vested, or me hereunto enabling, give, bequeath, limit, and appoint the same and every part thereof respectively, unto George Robinson, Elizabeth Matthews, Deborah Richardson, Joseph Henderson, Jane Macadam, and Ann Henderson, in equal shares; and I direct [*400] the same to be paid or transferred to them the said George *Elizabeth, Deborah, Joseph, Jane, and Ann, accordingly, as soon after my decease as conveniently may be."

The bill was filed by appointees under the will of Elizabeth Crozier, and the question in the cause was,—whether the 8750*l.* bank stock passed by her will, or only the original 7000*l.*?

Mr. *Bickersteth* and Mr. *Duckworth*, for the plaintiffs, contended, that the will manifested a plain intention in the testatrix to dispose of every thing which constituted part of the residue of her brother's personal estate, or which, under his will, she had power to bequeath. In enumerating the particulars of property she had fallen into a mistake: probably in consequence of her not being aware that the bank stock had been increased by a *bonus*, which, however, was not actually placed to the credit of the testator's estate till a few days after the right to it accrued, she had stated the amount of bank stock according to what it had previously been, instead of including in her estimate the 25*l.* per cent., which had been lately added to the capital. But such an inaccuracy in the specification of particular sums would not prevent the court from giving effect to the intention manifested by the general tenor of the bequest. *Milner* v. *Milner*.(*a*)

The defendants would probably rely on the case of *Norris* v. *Harrison*,(*b*) where bequests of 1400*l.* and 1400*l.* bank stock, were held not to pass the additional capital given by the 56 G. 3, c. 96. But the decision in that case proceeded on the ground that the testator had given only a specific amount of

(*a*) 1 Ves. sen. 107. (*b*) 2 Mad. 268.

the bank stock; that there were no words in the will which manifested an intention to give more than a specific sum; that the will *was [*401] made before the act giving the *bonus* was passed; and that there was no ground for supposing that the testator meant to give a portion of capital which did not then exist.

For the defendant it was argued, that the testatrix had so far as related to bank stock, disposed only of 7000*l.*, and that *Norris* v. *Harrison* was an authority in point. It must not be inferred that she would have disposed of the whole 8750*l.* bank stock in the same way as she chose to dispose of a much less sum. The testatrix was either aware or not aware that the *bonus* had been given by the act of parliament. If she were not aware of the circumstance, she could not have meant to give a thing, of the existence of which she was altogether ignorant: if she was aware of it, the specification of a sum of 7000*l.* bank stock, and the omission to make any mention of the *bonus* afforded clear proof that she meant to appoint only the 7000*l.*

The Master of the Rolls:—This is a question of intention; and it cannot be doubted, from the language used, that the testatrix meant to dispose of all the residuary property of her brother, although her enumeration of that property was not correct.

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*Ponton v. Dunn. [*402]

Rolls.—1830; March 8.

In a partnership deed it was stipulated, that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; and in case of the death of all his children to his executors or administrators: held, that the true construction of this, is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children: held, that his interest in the partnership passed by this bequest.

By an indenture dated the 25th of December, 1825, John Dunn and Joseph Bland agreed to become partners in the business of a tailor, for a term of seven years. John Dunn was to bring in three-fourths of the capital; and three-fourths of the profits were to be paid to him, his executors, administrators, and assigns. One of the stipulations contained in the deed of copartnership was in the following words:—"That no benefit or advantage shall come or accrue to the said Joseph Bland in case of the death of the said John Dunn, before the expiration or other sooner determination of the said copartnership, or otherwise howsoever, or of or in any stock or stocks, goods, debts, or other things belonging to the said copartnership trade; but

in case the said John Dunn shall happen to die before the expiration or other sooner determination of the said copartnership term, that then the said copartnership trade or business shall be carried on by the said Joseph Bland for the residue of the said term, for the benefit of himself and such persons or person as the said John Dunn shall by his last will and testament in writing, or any codicil thereto, name and appoint; and in default of such appointment, for the benefit of the widow of the said John Dunn; or if she shall be dead, for the benefit of his children, him surviving, in equal shares, or in such other manner as shall be mutually agreed upon between such children; and in case of the death of all and every of the children of the said John Dunn, for the benefit of his executors or administrators: such persons or person, or the said widow, children, or executors, or ad-
[*403] ministrators of the said *John Dunn, to stand precisely in his place and stead, and to be entitled to the same shares, proportions, and interests in, and to have the same control over (as to the management and carrying on (the copartnership trade, and the capital, increase, and profits thereof, as by the terms of these presents the said John Dunn would have been entitled to himself, if living."

John Dunn made his will in the following words:—"This is the last will and testament of me, John Dunn, of Bedford street, Covent Garden, in the county of Middlesex:—I desire that I may be interred in the burial ground belonging to the nearest church where I may depart this life, but not in a vault. I direct the payment of all my just debts, and funeral and testamentary charges and expenses. I give to my dear daughters, Catherine Ponton, and Isabella Rodber, the sum of 50*l.* each for mourning: and as to all my freehold, leasehold, and all other my estate and effects, of whatsoever nature or description the same may be situate and being, I give, devise, and bequeath the same, and every part thereof, unto my dear son, John William Dunn, a major in his majesty's service, his heirs, executors, administrators, and assigns, absolutely: I appoint my said dear son sole executor; and hereby revoking all former wills by me at any time heretofore made, I publish and declare this to be my last will and testament, as witness my hand and seal the 11th day of April, 1827. J. Dunn."

He died a few days afterwards, leaving his two daughters, Mrs. Ponton and Mrs. Rodber, and his son, John William Dunn, surviving. His wife had died in his lifetime. The business had continued, since his decease, to be carried on under the provisions of the deed, and had been profitable.
[*404] The testator had, after the execution of the *copartnership deed, given large portions to his two daughters, upon their respective marriages.

The bill was filed by Mrs Ponton and Mr. and Mrs. Rodber. It charged that the testator had not made any appointment of his share of the business; that he had not by his will referred or alluded to his power of appointment; and that he did not by his will execute, or intend to execute, his power. It,

therefore, insisted that his interest in the partnership, in default of such appointment, passed under the provisions of the deed to his three children (his wife having died in his lifetime,) in equal shares; and it prayed that the plaintiffs might be declared entitled to two-thirds of the testator's share of the partnership trade, stock, and effects, and to a like proportion of the profits during the residue of the term.

Mr. *Tinney*, Mr. *Pemberton*, and Mr. *Koe*, for the plaintiffs :—The interest of John Dunn in the partnership would have ceased on his death, had not the partnership deed stipulated otherwise; and by the words of that stipulation the rights of those who claim through him must be determined. Now the stipulation is, that the business should be carried on by Bland, after the death of Dunn, for the benefit of himself and such persons as Dunn should, by will, appoint; in default of appointment, for the benefit of Dunn's widow; or, if she died, of Dunn's children; and in case of the death of all his children, for the benefit of his executors or administrators: and the persons to whom the subsequent profits are thus given, are to take also Dunn's share of the capital. The deed amounts to a settlement of Dunn's interest in the partnership from the time of his death, on his widow, or, if she is dead, on his children, subject to his power of *appointment, by which their [*405] interests may be defeated. The widow is dead; and the only question therefore is, has he by his will made any appointment? The will does not profess to be an execution of the power; it does not refer to the power, nor to the subject of the power; it is merely a general disposition of the testator's estate and effects.[1] The will, therefore, is not an execution of the power; and the testator's interest in the partnership must go to the persons to whom, in default of appointment by him, it is limited by the deed. It cannot pass by the will as a part of the testator's assets, because it was only in the event of the decease of his wife and of all his children in his lifetime, that the property in question was to go to his executors and administrators. In the events which have happened, the executor is excluded by the limitations of the deed; and under those limitations the children are entitled to equal shares.

Mr. *Bickersteth* and Mr. *Wakefield*, contra :—Dunn and Bland are the only parties to the deed; and the sole object of it was to limit and fix their respective interests in the business. They agree that three-fourths of the profits during the whole continuance of the partnership shall, notwithstanding Dunn's death before the expiration of the term, be paid to him his executors, or administrators; and to avoid any doubt which might have arisen on the point, he stipulates expressly that he shall have the right to dispose by will of his interest in the business and profits. The deed made his interest in the future profits a part of his estate; and it must pass by the general words of the will. In no part of the deed can a single phrase be found, which manifests an in-

[1] Vide *Farmer* v. *Bradford*, 3 Russ. 354, 359, n. 1. *Buxton* v. *Buxton*, 1 Keen, 753.

tention on the part of Dunn to make a settlement of his interest in the partnership; his only object was to fix and ascertain his rights as between him and Bland, and to secure to himself and his legatees, or [*406] *personal representatives, three-fourths of the profits during the whole of the term. It would be extravagant to allege that there is any thing in the deed which would prevent his share of the capital from passing by his will as part of his general estate; and the future profits must go along with the capital.

THE MASTER OF THE ROLLS:—It is true the words "name and appoint" are used in the deed; but considering the relation of the parties, I cannot understand them to be used with a view to create a power of appointment in its technical sense, and to limit the testator's power of disposition by will over this part of his property. Without this stipulation those who claimed through him would have had no title to share in the partnership profits after his death; and it is a mere bargain with his partner, that he should have a power of disposition by will, and if he died without a will, that the property should devolve to his family in the manner stated. This property will therefore pass under the description in his will, of "all other his estate and effects, of whatsoever nature or description.[1]

The bill was dismissed.

[*407] *WINTERTON v. CRAWFURD.

ROLLS.—1830; March 8.

Semble, that to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will.

THE testator, William Board, devised the residue of his real estate, subject to a term of years, to trustees and their heirs, upon trust, as to one-third part, to pay the rents and profits to the separate use of his daughter, Harriett Bodicoate, during her life, and from and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the *survivors or survivor, and others or other of them*, share and share alike, and the several and respective heirs of the bodies of such *survivors or survivor, and others or other of them*. Then, after giving the other two-thirds by similar limitations, to his daughters Louisa Moreton and Fanny

[1] As to the comprehensiveness, of these and similar words, see *Kendall* v. *Kendall*, 4 Russ, 360. *Parker* v. *Marchant*, 1 Yo. & Coll. C. C. 290. How a partnership is dissolved, see 2 Russ. 62 n. 2, 342 n. 2. What is stated in the last cited note, in reference to the determination of a partnership by notice from one of the partners, must be understood of a parnership for a definite period: for where it is indefinite in duration, either party may put an end to it by notice. *Nerot* v. *Burnand*, 4 Russ. 346. *Alcock* v. *Taylor*, Taml. 506. *Hale* v. *Hale*, 4 Beav. 376. *Miles* v. *Thomas*, 9 Sim. 608.

Board respectively, for life, to their separate use, with remainder to their children, he continued his will in the following words:—"And I do hereby declare my will and mind to be, that, in case one or more of them the said Harriett Bodicoate, Louisa Moreton, and Fanny Board, shall happen to die without issue of her or their body or bodies, then the share or shares of her or them so dying without issue shall be in trust for, and I do hereby direct, limit, or appoint the same, to be in trust for the *survivors or survivor* of them my said daughters, for and during the natural lives or life of such survivors or survivor, the same to be by the trustees for the time being held and enjoyed for and during the joint natural lives of such survivors of my daughters, in trust for them as tenants in common and not as joint tenants, and the rents and profits of the accruing share or shares, to *which each [*408] of them my said daughters shall or may become entitled of and in my said estates, in the events aforesaid, to be for their and each of their sole and separate use, and in such and the same manner as is hereinbefore declared respecting their original parts and shares thereof; and from and immediately after the decease of the said survivor of my said daughters, then in trust for all and every the child and children of the bodies or body of the *survivors or survivor* of my said *daughters*, lawfully to be begotten (such children taking *per stirpes* and not *per capita*, the shares of the rents and profits, whereof their respective parents will, if living, be entitled to for life under this my will,) to be equally divided between or among them, if more than one, share and share alike, to take as tenants in common and not as joint tenants, and the several and respective heirs of the bodies of all and every such child and children lawfully issuing; and in case any one or more of such children shall happen to die without issue of his, her, or their body or bodies, then as to the share or shares of him, her, or them so dying without issue, in trust for the *survivors or survivor, and others or other of them*, to be equally divided between or among them, if more than one, share and share alike, to take as tenants in common and not as joint tenants, and the several and respective heirs of the bodies of such *survivors or survivor, and others or other* of them; and if all such children but one shall happen to die without issue of their bodies, or if there shall be but one such child, in trust for such surviving or only child, and the heirs of his or her body: and in default of such issue, then in trust for my two nephews, John Board and Richard Board, for their lives," with limitations over to their children.

Fanny Board intermarried with Gibbs Crawfurd, and died, leaving children. Afterwards Louisa Moreton *died without issue. Harri- [*409] ett Bodicoate had intermarried with the Earl of Winterton; she had no issue, and was advanced in years. From the time of Mrs. Moreton's death, a moiety of her third part of the rents had been paid to Lady Winterton; and it had been considered that the remaining moiety belonged to Mrs. Crawfurd's children.

The bill was filed by Lady Winterton and her husband, for the purpose,

among other things, of having it declared that she was entitled for life to the whole of that one-third share of the real estate which had been given to Louisa Moreton.

Mr. *Pemberton* and Mr. *Fane*, for the plaintiffs.

Mr. *Bickersteth*, Mr. *Barber*, and Mr. *Rolfe*, for some of the defendants:

Mr. *Tinney* and Mr. *Spurrier*, for others of the defendants:—The argument on behalf of the children of Mrs. Crawfurd was, that the words "survivor and survivors" necessarily meant in one part of the will "other and others," and ought therefore, to receive the same meaning throughout the whole of the instrument. When the testator declares that the share of a daughter dying without issue should be "in trust for the survivor and survivors of his daughters during the natural life or lives of such survivor or survivors as tenants in common," and "from and immediately after the decease of the survivor of his daughters, in trust for all and every the child and children of the bodies or body of the survivors or survivor of his daughters lawfully to be begotten, such children taking, *per stirpes* and not *per* [*410] *capita*, the *shares of the rents and profits whereof their respective parents will, if living, be entitled under this will," the words "survivors or survivor," in the phrase "children of the bodies or body of the survivors or survivor," must mean "others" or "other;" for if they do not receive that construction, it would follow that, as Mrs. Crawfurd never was a surviving daughter, her children could not take, upon the death of Mrs. Moreton and Lady Winterton without issue, the shares given to those two ladies for life. But it clearly was the intention of the testator that, in that event, the issue of Mrs. Crawfurd were to take; and the fund was not to go over to the nephews, unless there was a failure of issue of all the daughters. Since, then the words "survivors or survivor" must be read "others or other" in the gift by way of remainder to the children of the surviving daughters, they should receive the same construction in the gift of the share of the daughter dying without issue to the "survivors or survivor" of the daughters; and the children of Mrs. Crawfurd would, upon the death of Mrs. Moreton, become entitled to that moiety of the income of Mrs. Moreton's share, which their mother, if alive, would have unquestionably taken. It was apparent that, throughout the whole of the will, the testator used indiscriminately the phrases "survivors or survivor," and "others or other."

On the other hand, the plaintiffs contended, that, on the death of Mrs. Moreton without issue, the income of the whole of her share went, according to the words of the will, to "the survivors or survivor," that is to Lady Winterton who was then the sole surviving daughter of the testator: and there was no reason for departing from the natural and proper meaning of the words.

On the contrary, it was clear that the testator did not mean that any [*411] part of the share of a daughter dying without issue *should go to the children of a daughter, so long as any of his daughters lived; for the gift to the children was only "after the decease of the survivor of his daugh-

ters." If, in order to accomplish the general intention of the testator, it were necessary, in the clause which followed, to give to the words "survivors or survivor" the sense of "others or other," it did not follow that they ought to receive the same construction in a preceding part of the will; especially as it was apparent on the face of the instrument, that the testator distinguished between "survivors or survivor" and "others or other."

The counsel for the nephews contended, that, in the event of Lady Winterton's death without issue, they would be entitled to take the whole of the shares of her ladyship and Mrs. Moreton, to the exclusion of the children of Mrs. Crawfurd, because these children did not come within the description of "children of the bodies or body of the survivors or survivor of the testator's daughters;" and the words "survivors or survivor" ought there to be read literally, and were not to be considered as synonymous with "others or other." But ultimately they withdrew from the argument, on the ground that it was premature to discuss this question while Lady Winterton was alive.

THE MASTER OF THE ROLLS:—In order to effectuate the intention of the testator, the court sometimes gives to the word "survivors" the sense of "others." Here the expressions of the testator are too precise to impute to him such an intention;[1] and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the motion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent.

*It is true that, in the gift over after the death of the surviving [*412] daughter to the children of the survivors or survivor, the words survivors or survivor may receive a more enlarged meaning.(a) The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated, if, upon the death of Lady Winterton without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare that Lady Winterton is entitled for life, to her separate use, to the one-third share of the real estate which by the will was given to her sister, Louisa Moreton.

(a) See *Wilmot* v. *Wilmot*, 8 Ves. 10. *Davidson* v. *Dallas*, 14 Ves. 578. *Crowder* v. *Stone*, 3 Russell, 223. *Milson* v. *Awdry*, 5 Ves. 465. *Doe* v. *Wainwright*, 5 Term. Rep. 427. [3 Russ. 224, n. 1.]

[1] Vide 3 Myl. & Cr. 614, n. 2. *Slade* v. *Park*, 1 Yo. & Coll. C. C. 565.

[*413] *BREEDON *v.* BREEDON.

ROLLS.—1830; March 13.

A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper; but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons: Held,

That the sons were only joint tenants for life with a power of sale;

That they could make a good title, and give discharges for the purchase money;

That they were joint tenants for life of the purchase money; and that, upon the death of the survivor, it would devolve to their children.

THE part of the will of Dr. Breedon, on which the question in the cause arose, was in the following words:—"And I give and bequeath unto my dear sons Charles and William Breedon (except as hereinafter excepted,) my waggons, carts, horses, farming stock, hay, corn, &c. at Bere Court or Flower Farm, or any other place in the parish of Pangbourn, conditionally, that all horses or any horse or mare which shall have been in my service, and are more than fourteen years old, shall never be disposed of, nor put to any harder work than harrowing light land, or drawing very light cart loads, or if lame or broken winded, not to be used at all, but to be well kept and taken care of in meadows and straw yards; and during such time I desire that four shillings a week shall be paid by Charles and William Breedon to an aged man, of good character, for looking after the said horses. I also give and bequeath to the said Charles and William Breedon the farm called Flowers, including Brook, Furlong, Herridge's Land, Woods, and Bere Leys, with permission for them to dispose of the said farm to my son John Symonds Breedon, or next person in possession of the manor of Pangbourn and estate of Bere Court, if they think proper to do so; but advise them to be very cautious and circumspect in this matter, and to make due provision for the fulfilment of the above condition respecting the aged horses by the purchaser of the said property; and in case my son, or next in possession of the said manor, should not agree to purchase the same, and my said sons Charles and William should wish to let the said farm, they may do so, subject to the same [*414] restrictions. And if the said farm should not be sold, I *bequeath the same, after the decease of either of my said sons, to the survivor; and after the decease of both, to be sold by auction, and the purchase money thereof to be equally shared between the children of the said Charles and William; and if they or neither of them shall not have left any child or children, then to be shared equally between the daughters of Henry Breedon, Elizabeth Hulme, and Jane Breedon, if she should have any.

The testator's sons Charles and William entered into a contract with their brother, John Symonds Breedon, for the sale to him of the farm called Flowers, including the other lands therewith connected by the will, subject to the

condition as to keeping the aged horses; and the bill was filed by them for the specific performance of this contract.

Two questions were made: first, whether Charles and Williams could give a sufficient discharge for the purchase money; and secondly, what interest the parties would respectively take in that purchase money.

Mr. *Pemberton* and Mr. *Bellasis*, for the plaintiffs:—A testator may give a fee either by words of express limitation, or by manifesting his intention to devise the lands for a purpose which requires that the devisees should have the fee. Here the property is devised to Charles and William, and they are to dispose of it; the testator, therefore, must have meant them to take the fee. If they take the fee, they take it beneficially; for there are no words to limit or control the devise to them, or to make them trustees for others, except in the event of the farm not being sold. The limitations over to the children of Charles Breedon and William Breedon, *and to the [*415] daughters of Henry Breedon, Elizabeth Hulme, and Jane Breedon, are only "if the farm should not be sold:" if the farm is sold by William and Charles, there is no gift of any interest in the purchase money to those children or daughters. It may be said that such a disposition of property is somewhat singular. It is, however, the disposition contained in this will; and the testator may have adopted it from an anxious desire that these particular lands should be sold to the person in possession of the manor of Pangbourn and the family estate. The gift of the purchase money to Charles and William, if the sale took place during their lives, was a premium to induce them to sell.

If Charles and William take the absolute beneficial interest in the lands in the event of their selling them, it is clear that there can be no objection to the title. But even if they do not take the absolute beneficial interest, and if they are to be considered as mere tenants for life, with a power to sell, still it is plain that the testator intended that they should have an immediate power of sale; and as infants and persons not *in esse* were to be interested in the purchase money, it must be inferred, according to *Sowarsby* v. *Lacy*,(*a*) that Charles and William were to have power to grant receipts for the purchase money. In either way, therefore, they can make a good title to the purchaser.

Mr. *Bickersteth*, for the purchaser:—The testator has not given Charles and William, the fee by words of legal limitation: he has given them only an estate for life, with a power of selling the property to certain persons: and there is no purpose expressed in the will, which requires that they should *take more than an estate for life, with a power of sale. [*416] If they do not take the legal fee, there is no pretext for saying that they are entitled absolutely to the purchase money; and even if the legal

(*a*) 4 Mad. 142. See also *Doran* v. *Wiltsh're*, 3 Swanston, 699. *Lavender* v. *Stanton*, 6 Madd. 46.

fee were in them, they would be merely tenants for life of the purchase money, with remainders over, in the same manner as if the lands had not been sold till after the death of the survivor. It would be absurd to suppose that the testator meant that the tenants for life should take the purchase money absolutely, if they exercised the power of sale, when it is clear they were not to take it, if the sale did not happen till after their death; in other words, that their title to the purchase money should depend on their own pleasure. If the object of the testator had been to secure the union of these lands with the family estate, he could easily have made it imperative on Charles and William to sell them to the person in possession of the manor of Pangbourn and the Bere Court property.

Thus, the plaintiffs are merely tenants for life, with a power of sale: there is no authority to them to sign receipts for the purchase money; and in that purchase money infants and persons not *in esse* are or may be interested; the plaintiffs, therefore cannot give the purchaser a secure title.(*a*)

Mr. *Rolfe* and Mr. *J. Russell*, for other defendants.

THE MASTER OF THE ROLLS:—The words of the will import an absolute power of sale, if Charles and William so think fit, to the persons
[*417] *described in the will; and consequently Charles and William are capable of giving an effectual discharge for the purchase money.

It being in the option of Charles and William whether they would or not make sale of the estate, it is not to be intended that the testator meant that, if they thought fit to sell the estate, they should become entitled to the purchase money for their own use: but that, if they did not sell the estate, they should take only a limited interest in it. The rational construction is, that all parties were to take the same interest in the produce of the estate, if sold by them, as is expressly limited if the sale by Charles and William did not take place. Charles and William will, therefore, be only joint tenants for life of the purchase money, with benefit of survivorship; with remainders over, according to the provisions contained in the will, in case the estate was not sold by them.

(*a*) The doctrine on this subject is stated, and the authorities collected, in Sugden's Law of Vendors and Purchasers, page 498, 6th edition.

*Cockerell v. Cholmeley.[1] [*418]

Rolls.—1830; March 17.

A court of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstance in the manner of execution; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.

In order to work confirmation, the party said to confirm must know the law as well as the fact.

Where judgment had been given at law, that a power of sale had not been well executed, the defendants at law, claiming under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument, by which it had been executed, rectified: and they at the same time prosecuted a writ of error on the judgment: the suit in equity having been brought to a hearing, Held,

That the plaintiffs in equity were bound to elect either to have the bill dismissed or to abandon the writ of error.

Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and in the mean time, to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2448*l* conveyed the timber to the purchaser, and the trustee, in consideration of 13,400*l.* conveyed the land exclusive of the timber. Many years afterwards, the tenant for life, being advised, that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3 per cent. stock as 2448*l.* would have produced at the time of the sale. After the death of A. the next remainder man though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of foremedon, and obtained judgment, on the ground that the power of sale was not well executed: Held,

That a court of equity could not relieve against that judgment.

The instruments and transactions, out of which this suit arose, are stated in 3 Russell, 565, where the judgment of Lord Eldon, on the cause shown against dissolving the injunction, is reported.

The letters between Sir H. C. Englefield and the purchaser, which had been laid before Lord Eldon, and introduced into the record by amendment, were proved; and the cause was now brought on to a hearing.

Mr. *Pemberton* and Mr. *Cockerell*, for the plaintiffs.

*The questions to be considered resolve themselves chiefly into [*419] two: first, what was the real character of the sale in 1783, now sought to be defeated? and, secondly, what is the effect of the subsequent transactions, and especially of the proceedings in the year 1806, in giving validity to that sale?

Upon the first point it is observable, that, by Sir H. Englefield's will, no personal confidence was reposed in the trustees; the powers were not confined to them as individuals, but were extended to their heirs. No re-investment of the produce of the sales was to be made, unless with the con-

[1] S. C. Taml. 435.

currence ofthe tenant for life, to whom an option was left of treating that produce either as personal or as real eatate: it being simply the duty of the trustees to see that an adequate price was obtained. That furnishes decisive evidence of the testator's intention, that every thing should depend upon the pleasure of the person beneficially entitled. The negotiation in 1782 for the purchase of White Knights, was carried on exclusively by Martin's agent on the one hand, and by Sir H. C. Englefield, the then tenant for life, on the other, without the intervention of the trustees. The contract in which the treaty terminated, and which is recited in the deed of 1783, purported to be for a conveyance of the land by the trustees, and of the timber by the tenant for life. In truth, however, there was but one sale, and the whole formed a single and entire transaction. If, indeed, any doubt could remain as to the real nature of the transaction, that doubt would be set at rest by referring to the correspondence which formed the basis of the contract. The letters constitute a complete agreement in writing, made up of proposal on the one side, and acceptance on the other; and they at once supply materials for correcting the erroneous recital in the subsequent conveyance, and [*420] for explaining and getting rid of the *difficulty which was fatal to the case at law.(a) These letters establish, beyond dispute, that the full value was given for the property, and that the sale of the land and the timber was by one general contract entered into by the tenant for life, with the consent and approbation of the trustees. Coupled with the proposition which immediately followed, they specify the terms upon which the agreement was finally concluded with sufficient precision to be the foundation of a decree for specific performance; or, in another view to enable the court to reform, according to the true intent of the parties, the conveyance afterwards executed to carry the agreement into effect. The indenture of 1783, therefore, must either be construed with the aid of the lights supplied by the correspondence, or the correspondence must be considered as forming the contract which was really intended to be effectuated, and the conveyance must be remoulded agreeably to it.

If these arguments should not prevail, still the steps taken subsequently by Sir H. C. Englefield,—his re-investment, in 1806, of the produce of the sale of the timber, thereby in effect adding his sanction to what had been done, and recognizing it as entirely an act of the trustees,—must give it complete validity: and even if that were otherwise, the conduct pursued by the present defendant,—his standing by while large sums were expended by the purchaser on improvements, his being privy to the measures for the appointment of new trustees, and his receiving to his own use a portion of the trust funds, the produce of the sale,—amount in equity to such a confirmation of the transaction, that this court will not now suffer it to be overturned.

(a) *Cholmeley* v. *Paxton*, 3 Bing. 237.

Mr. *Bickersteth* and Mr. *Lynch* appeared for the defendant, but were not called upon to argue.

*THE MASTER OF THE ROLLS:—The late Sir Henry C. Englefield [*421] was, under the will of his father entitled as tenant for life, without impeachment of waste, to a certain mansion house and lands called White Knights, as to which a power of sale, to be exercised only at the request and by the direction of the person in possession for the time being, was given to two persons, of whom Lord Cadogan was the survivor. In 1782, Sir Henry C. Englefield, with the privity of Lord Cadogan, entered into a treaty with the agent of Sir Byam Martin for the sale to him of the White Knights property; and a contract was concluded between Sir Henry C. Englefield and Sir Byam Martin's agent for the sale to him of the estate, exclusive of the growing timber, at the sum of 13,400*l.*, and for the sale of the growing timber at a valuation, which amounted to 2448*l.* This contract was carried into effect by an indenture of bargain and sale, bearing date the 12th of May, 1783; and it being then conceived, that, as Sir Henry C. Englefield was tenant for life, without impeachment of waste, he was entitled to receive for his own benefit the amount of the valuation of the timber, he, in consideration of the sum of 2448*l.* thereby conveyed the timber to Sir Byam Martin; and Lord Cadogan, in consideration of 13,400*l.*, thereby conveyed to him the land, exclusive of the timber.

By the power of sale given to the trustees under the will of Sir Henry Englefield's father, the produce of any sale was to be laid out in the purchase of other land to be settled to the same uses, and, in the mean time, was to be invested in the funds upon the same trusts; and the 13,400*l.* was accordingly so invested by Lord Cadogan.

In the month of June, 1786, Sir Henry C. Englefield, having discovered that he was not entitled to the amount of *the valuation of the [*422] timber, transferred to Lord Cadogan the sum of 3631*l.* 4*s.* three per cent. consolidated bank annuities, being the amount of stock which 2448*l.* would have purchased at the time of the sale.

Sir Henry C. Englefield died without issue in 1822; and thereupon the defendant became entitled as next in remainder in tail, under the will of Sir Henry Englefield's father, to the White Knights estate, or to the lands or stock which should be purchased with the price of the estate. The defendant was, during the life of Sir Henry Englefield, aware of the fact that Sir Henry Englefield had received the price of the timber, and had afterwards returned it to Lord Cadogan; and, upon application made to parliament by Sir Henry Englefield for authority to employ part of the purchase money of the White Knights estate for some general purpose under his father's will, which had devised other considerable estates to the same uses, the defendant had notice of the application, as next in remainder to Sir Henry Englefield and did not oppose it.

After the death of Sir Byam Martin, the Duke of Malborough became the

purchaser of the White Knights estate, and, having greatly improved it, he mortgaged it to the plaintiffs, Sir Charles Cockerell, and Henry Trail, for a sum of 50,000*l.* Under a power of sale, contained in their mortgage deed, the estate was subsequently put up to auction, and purchased by Sir Charles Blount at a sum of 36,000*l.*; and he, together with the Duke of Malborough and his trustee, having joined as plaintiffs with Sir Charles Cockerell and Henry Trail in this suit.

In Michaelmas term, 1823, the defendant brought a writ of formedon in the court of common pleas to recover the White Knights property, upon [*423] the ground that *the power of sale under the will of Sir Henry Englefield's father was not duly executed; and the judgment of that court was in his favor.(*a*) Upon a writ of error to the exchequer chamber, this judgment was affirmed, and a writ of error from the exchequer chamber to the house of lords is still depending.

The present bill was filed to restrain the defendant from proceeding at law under the judgment which he had obtained in the common pleas; to have the benefit of the contract made by Sir Henry Englefield with Sir Byam Martin in 1783; to have the defect in the execution of the power supplied; and to have the indenture of the 12th of May, 1783, reformed and amended, and made conformable to the contract.

At the opening of the cause, it was insisted for the defendant that the plaintiffs could not proceed at law and in equity at the same time, and that they must either abandon their writ of error in the house of lords, or dismiss the present bill. I was of that opinion; and the plaintiffs undertook to abandon the writ of error.[1]

(*a*) This case is reported in 3 Bingham, 237, under the name of *Cholmeley* v. *Paxton*.

[1] Where a party claiming to be entitled to real estate, but being uncertain whether his title was a legal or equitable one, was proceeding for the recovery of it by action at law, and bill in equity at the same time: it was held, that he was bound to elect either to suspend his proceedings at law, or to have his bill dismissed, although the relief prayed by the bill, embracing an account of rents, and a delivery of the title deeds, was more extensive than that which was sought by the action; and Lord Cottenham said: "Applications to restrain a party from proceeding in two different courts at the same time, for the same cause of suit, are of two kinds. In cases of election, properly so called, the application is, that if the plaintiff elects to proceed at law his bill may be dismissed; and the order upon that motion is not within the discretion of the court. But there is another class of cases, which are not, properly speaking, cases of election, where the proceeding at law is ancillary to that in equity. There the form of the application is different—that if the plaintiff shall elect to proceed at law, the suit may be stayed in the mean time—for, in those cases, the court has a discretionary power to mould the proceedings with a view to its own decree, and, for that purpose may retain the bill until the action shall have been disposed of. That is the course frequently adopted on motions for an injunction, where it appears that there is a legal question to be tried before the court can make a decree. In such cases it is the constant practice to direct that an action shall be brought, retaining the bill in the mean time. And upon the same principle, if, in such a case, the court found an action already commenced which would ascertain the legal right, it would allow such action to proceed without dismissing the bill." *Royle* v. *Wynne*, Cr. & Ph. 252. Where a vendor had conveyed an estate, and taken a bond for the purchase money, and afterwards sued upon the bond at law, and in equity upon his equitable lien, Lord Langdale, M. R. said, "that although a mortgagee was entitled to pursue all his remedies concur-

The plaintiffs have given in evidence a very long correspondence between the agent of Sir Byam Martin and Sir Henry Englefield prior to the indenture of the 12th of May, 1823, for the purpose of proving that by such correspondence a contract in writing had been perfected between Sir Byam Martin and Sir Henry Englefield for the purchase of the estate and timber from the latter. It appears to me that this correspondence did not contain a proposal and acceptance of all the terms of the contract; but it proves that, in the treaty, Sir Henry Englefield dealt as the owner both of land and timber.

*This is one of the most unfortunate cases that ever occurred in a [*424] court of justice. The parties concerned in the transaction complained of, acted with the most perfect fairness and integrity, and, after an enjoyment has been had under it of nearly half a century, and after a transmission of interests to other persons, and great improvements, so that the property has become more than doubled in value, it is sought to be recovered upon the restoration only of the original price. And it must be observed that the transaction at the time worked no injury to the defendant. It is not pretended that full justice was not done to his contingent interest in the price paid; and where all was just in substance, he comes into court and claims the property upon a mere mistake of form. But the law is with him; and in the exercise of the jurisdiction of a court of equity, I am fettered by precedent.

The plaintiffs call upon this court to supply the defect in the execution of the power, or to reform and amend the deed of the 12th of May, 1783. A court of equity will, in favor of persons standing in the situation of the plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will.[1] But here it is at law decided, that there was no power in the trustees to sell the land without the growing timber, and there

rently, yet in this case where the vendor had taken a bond to secure the purchase money, he could not be permitted to sue at law and in equity at the same time: that this order to elect would not prejudice the plaintiff, for if he failed in one remedy he might resort to another." *Barker* v. *Smark*, 3 Beav. 64. A creditor filed a bill against his debtor and other persons, to whom a judgment had been confessed by such debtor, to set aside the judgment for fraud, and obtained an injunction to stay proceedings on the judgment; and while the suit was pending in this court, he proceeded at law against his debtor, obtained judgment, and issued execution, under which the debtor's property was advertised for sale. The court refused to dismiss the bill on the petition of the defendants, but required the plaintiff to make his election immediately, either to stay his execution at law, during the continuance of the injunction, or consent to have the injunction dissolved; and the plaintiff refusing to make an election, the injunction was forthwith dissolved. *Livingston* v. *Keene*, 3 Johns. Ch. Rep. 224. If the plaintiff having obtained a judgment at law, elect to proceed on his judgment, the bill will be dismissed with costs; but if he elect to proceed on the bill, he will be enjoined from proceeding on the judgment. *Rogers* v. *Vosburgh*, 4 Johns. Ch. Rep. 84. An order for the plaintiff to elect cannot be obtained until after the time for excepting to the answer has expired. *Leceister* v. *Leceister*, 10 Sim. 87. Whether a plaintiff by proceeding after an order to elect, is to be deemed to have made an election, see *Fenner* v. *Humphery*, 4 Beav. 8.

[1] There seems to be a transposition, in the text, of the words "deed" and "will." It ap-

is no execution by the trustees of the power to sell the land with the growing timber; and I find no authority which applies to this case.

With respect to the reformation of the deed, it is true that a court of equity will, in favor of persons standing in the situation of the plaintiffs, relieve against a deed, *which, by mistake of the drawer, does not effectuate the real intention of the parties.[1] But can it be said that the drawer of this deed has mistaken the real intention of the parties? Can it be said, that it was not the real intention of Sir Henry Englefield to convey the timber, and to receive the price, when he did actually convey the timber, and did receive the money, and retain it for some years? Or can it be said that the trustee did not mean to convey the land alone, without the timber, when he receives the price of the land alone, and permits Sir Henry Englefield to receive the price of the timber? And on the other hand, must it not have been the intention of Sir Byam Martin to take the timber by the conveyance from Sir Henry Englefield, and to take the land alone by the conveyance from the trustee, when he paid to the first the price of the timber, and to the trustee the price of the land only?

[*425]

It has been argued, that the defendant, being aware of the facts of the case in the lifetime of Sir Henry Englefield, has, by his silence, and by being a party to the application to parliament, confirmed the title of the plaintiffs. In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law; and here there is no proof that the defendant, at the time of the acts referred to, was aware of the law on the subject, nor was it even alleged in argument.[2]

Upon the whole, I know no precedent for a decree in favor of the plaintiffs, and consider myself bound, therefore, though reluctantly, to dismiss the bill; but, in such a case, it must, of course, be without costs.

pears to be well settled that where a power is to be executed by *will*, an execution by *deed* is invalid. *Phipson* v. *Turner*, 9 Sim. 240, and note ibid. The defective, but not the non-execution, of a power is aided in equity; nor is a defective execution aided in favor of a volunteer. See on this subject, 1 Story's Eq. Juris. § 169, 176. 3 Russ. 581, n. 1. *Schenck* v. *Ellingwood*, 3 Edw. Ch. Rep. 175.

[1] As to the reformation of written instruments, see *The Marquis of Breadalbane* v. *The Marquis of Chandos*, 2 Myl. & Cr. 711, 740, n. 1, and cases there cited. *Alexander* v. *Crosbie*, Lloyd & G. 149, and n. *a*. *Wiser* v. *Blachly*, 1 Johns. Ch. Rep. 407. *Minturn* v. *Seymour*, 4 Johns Ch. Rep. 497. *The United States* v. *Monroe*, 5 Mason, 59. *Gillespie* v. *Moon*, 2 Johns. Ch. Rep. 585. *Peters* v. *Goodrich*, 3 Conn. Rep. 146. *Wheaton* v. *Wheaton*, 9 Conn. Rep. 96. *Pride* v. *Boyce*, 1 Rice's (South Carolina) Eq. Rep. 275. *Jones* v. *Robertson*, 2 Mun. 187. *Long* v. *Irael*, 9 Leigh's (Virginia) Rep. 556. *Tilghman* v. *Tilghman's Executors*, 1 Baldw. 464. 1 Story's Eq. § 152, et seq. Amer. Ch. Dig. Jurisdiction, XI.

[2] Vice *Gray* v. *Murray*, 3 Johns. Ch. Rep. 188. 3 Russ. 574, n. 1.

*Young v. Everest. [*426]

Rolls.—1830; March 18.

Where, upon a bill filed by a simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out upon the master's report, that the assets are insufficient to pay the specialty creditor, the executor will have his costs out of the assets, but not the plaintiff.

In such a case the specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the master's report.

The bill was filed by a simple contract creditor of a testator, for the administration of the assets. An action had been brought by a specialty creditor, who, after the bill filed, was, upon the application of the executor, restrained from proceeding at law. The common decree was made in the cause; and upon the master's report it appeared that there was no other specialty creditor than the plaintiff in the action, and that the assets were not sufficient for the payment of his debts.

The cause now coming on to be heard, on further directions, Mr. *Temple* appeared for the specialty creditor, to object to the diminution of his fund by the payment of costs to any of the parties.

Mr. *Barber*, for the plaintiff, insisted that the specialty creditor, not being a party to the suit, had no right to appear: if he wished to be heard on any point, it was at least necessary that he should present a petition.

The Master of the Rolls held that, if the specialty creditor had a case to make, depending upon any fact which did not appear on the master's report, he could not be heard without presenting a petition, and proving that fact: but if he desired to take advantage of nothing except what was to be found in the report, a petition would be an unnecessary expense, and he had a right to be heard in defence of his interest.[1]

Mr. *Temple* then argued that, if the costs of the suit were paid out of the estate, they would in effect be borne by *the specialty creditor, [*427] whose demand the assets were not sufficient to pay. To him the suit had produced nothing but delay; he had been content to assert his rights at law; he had not called for the intervention of a court of equity: why then should he pay for proceedings altogether useless, which others had instituted with a view to their own benefit, and to his detriment.

Mr. *Barber*, contra: —The simple contract creditors had no means of being acquainted, before the institution of the suit, with the amount of the assets; it is only by the proceedings in the master's office that their amount has been ascertained: the specialty creditor has the sole benefit of what has been done; the account, which has been taken, shows to what funds he is entitled; and by this suit these funds are put into his possession. In *Lechmere* v. *Bra-*

[1] Vide *Bozon* v. *Bolland*, ante 69.

zier,(*a*) the suit was instituted by the simple contract creditors; the assets turned out to be insufficient for the payment of the specialty debts; yet the plaintiffs had their costs out of the fund.

Mr. *Wood*, for the executors, submitted that, as the suit was not collusive, the executors ought to have their costs.

THE MASTER OF THE ROLLS said, that, as the suit did not appear to be collusive, the executor was entitled to his costs out of the assets, but was of opinion that the assets ought not to be further diminished by the payment of the costs of the plaintiff.[1]

It appearing, however, that there was a probability of further assets being realized, it was referred back to the master to continue the accounts.[2]

[*428] *HARRISON *v.* COURTAULD.(*b*)

1830; March 15.

In equity, an objection to the competency of a witness is not waived by cross-examination.

THE plaintiff offered to read the evidence of a defendant who had disclaimed, but to whose competency there was a valid objection; it being apparent on the bill itself that he had an interest in the success of the plaintiff. The principal defendant had cross-examined him on the merits at great length.

[1] Vide *Rowland* v. *Tucker*, post, 635.

[2] In a suit by a simple contract creditor, whose debt was secured by a deposit of deeds by way of equitable mortgage, against the executors and devisees of the debtor, the mortgaged premises were sold, and were not sufficient to pay the plaintiff's debt; and the general assets of the testator were insufficient to pay his debts and the costs of the suit; It was held that the plaintiff as equitable mortgagee was entitled to the proceeds of the sale of the mortgaged premises, and the executors of the testator were entitled to retain in full out of the general assets, the debts owing to them by the testator, and that the residue of the assets should be applied in the following order:—in payment,—first, of the costs of the executors, as between solicitor and client; secondly, of the costs of the plaintiff (including those of the purchaser, which the plaintiff was ordered to pay); thirdly, of the costs of the defendants beneficially entitled under the devise; and fourthly, of the debts remaining due to the plaintiff and the other creditors. *Tipping* v. *Power*, 1 Hare, 405. In an administration or creditor's suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency, will be set off against his debt; and the costs of the same executor incurred in the proper performance of the duties of his trust, after his bankruptcy or insolvency, will be allowed out of the estate. *Samuel* v. *Jones*, 2 Hare, 246.

(*a*) 1 Russ. 72.

(*b*) PIGOTT *v.* CROXALL.

The suit was instituted by parties claiming under a will, to set aside a subsequent codicil, on the ground that the testator was not of sound and disposing mind when he executed it. In support of the codicil the defendants had examined several witnesses who took legacies under it: and the plaintiff had cross-examined these witnesses on the merits. Their competency was objected to on the ground of interest; and it was insisted for the defendants, that the plaintiffs, by cross-examining them, had waived the objection.

Mr. *Heald* and Mr. *Willis*, for the defendants.

Mr. *Pemberton* objected to his competency; and, to prove that the objection was not waived by the cross-examination, cited *Moorhouse* v. *De Passou.*(*a*)

*Mr. *Bickersteth* contended that here the fact of interest, out of [*429] which the objection arose, was apparent on the record; notwithstanding which the defendant, with full knowledge of the objection, had cross-examined *the witness, not merely to rebut the plain- [*430] tiff's case, but to prove the defence.

THE MASTER OF THE ROLLS held, that the evidence could not be read.[1]

The fact, out of which the objection arises, was well known to the plaintiffs at the time of the examination; they do not choose to rely on the objection, but they sift the witnesses, as if they were in all respects competent. In *Moorhouse* v. *De Passou*, the interest which disqualified arose out of a particular agreement between the witness and the defendant; and the judgment of Sir William Grant proceeded on the ground, that the objection was not known to the plaintiff. "The waiver," says he,(†) "arises from pursuing the examination after the objection to the competency of the witness is known; but it is difficult to see how an unknown objection can be waived." In *The Corporation of Sutton Coldfield* v. *Wilson*,(‡) the interest which disqualified was of a notorious character; and, accordingly, the objection was held to be waived by cross-examination.

Mr. *Tinney* and Mr. *Russell*, contra.

It is not enough that the plaintiff knows or suspects that the witness is interested; he must have from the witness himself an admission of the existence of the interest, or he must have proof of it upon articles exhibited after publication passed: and as he is ignorant what answers are given to the several interrogatories till publication is passed, he cannot till then know whether there is a sufficient ground for objecting to the competency of the witnesses. He cannot safely omit to cross-examine, because, it may turn out that the witness has denied all interest; and the party cannot be sure that he could afterwards show this denial to be false. The point was carefully considered by the barons of the exchequer in *Scott* v. *Fenwick*;(§) and they laid down the rule in the following words:—"The rule of evidence in equity ought to be analogous to the courts of law. When the interrogatories are drawn, it is impossible for the party to know what answer the witness will give to them; consequently there is no opportunity of stopping in the course of the cross-examination, and of urging the objection, till after the depositions are published, and the evidence comes to be read in court. Then, if the party permits the evidence to be read, he thereby waives the objection to the competency of the witness; but, if he uses the first opportunity that offers, by urging it at the hearing before the evidence is read, it ought to be admitted and to prevail."

In *The Charitable Corporation* v. *Sutton*,(‖) the objection to the competency of a witness was held to have been waived by "such of defendants as had cross-examined him and had thought proper to read his deposition."

Sir John Leach, Vice-Chancellor, rejected the evidence.

(†) 19 Ves. 435. (‡) 1 Vernon, 254. (§) Gwillim, 1255.

(‖) 2 Atk. 403. See also *Bland* v. *The Archbishop of Armagh*, 3 Bro. P. C. 520, Toml. edit. There the objection went, not to the competency, but to the credibility of the witnesses; and their depositions had been read without objection.

(*a*) 19 Ves. 433. Cooper, 300.

[1] By the Revised Statutes of New York, (vol. 2, p. 109, § 89, 2nd ed.) "The respective parties and their counsel, may be present at the examination of any witness, produced before a Vice-Chancellor, or an examiner, or under a commission; and every such witness may be examined, cross examined, and re-examined orally." Where the interest of the witness was first disclosed to the opposite party upon the direct examination, who then raised the objection, which was overruled, and afterwards proceeded to cross examine the witness, his deposition was

[*431] *WEST v. BERNEY.(a)

1819.—January 27.

Learning as to what powers of appointment are capable of being extinguished or released.

IN this case the master had reported that a good title was shown: and exceptions were taken to the report. The question arose on the following instruments:—

suppressed by the Vice-Chancellor; and, on affirming the Vice-Chancellor's order, the following observations were made by the chancellor, (Walworth):—"The objection here was taken in time; because it did not appear that this witness was interested until after he was sworn and examined in chief. The objection was taken before his direct examination had closed; and, I presume, as soon as he testified to the facts which showed his interest. The examiner having permitted the examination to proceed notwithstanding the objection, the defendant did not lose the right to apply for a suppression of the deposition, by cross examining the witness as to the merits." The chancellor, after reviewing the cases cited above; and, in addition, noticing *Vaughan* v. *Worrall*, 2 Mad. Rep. 322; *Perigal* v. *Nicholson*, Wightwick's Rep. 64; proceeded as follows, "In this state, since the passing of the statute allowing the examination of witnesses openly, I believe it has been the uniform practice to permit a party to cross examine his adversary's witnesses, without prejudice to his right to move to suppress their depositions on the ground of incompetency. The only restriction imposed upon a party in such cases is, that he should make the objection to the competency of the witness in due season, so that his adversary may have an opportunity to remove the objection by a release, or otherwise; or to supply the defect in his testimony by other witnesses, if possible. (2 Paige's Rep. 60, Rule, 85. And see 7 Wendell's Rep. 180.) The course pursued at law now forms a proper guide for parties in the examination of witnesses in this court. Where it appears upon the face of pleadings that the witness is incompetent, the adverse party may object to his examination in the first instance. If the examiner overrules the objection, or reserves the question, or the party insists upon proceeding against the decision of the examiner, the adverse party may cross examine the witness to the merits, and then move to suppress the deposition; or he may object to the competency of the witness on the hearing. Where the objection does not appear upon the pleadings or upon the testimony of witnesses previously examined, the party, against whom the witnesses are called, may raise the objection whenever the facts on which it is founded are disclosed by the witness. He may also, at the time of the examination, raise the objection that the witness is interested, stating in what that interest consists, and may afterwards establish the fact of interest by other witnesses." *Rogers* v. *Dibble*, 3 Paige, 240. And see *Hitchcock* v. *Skinner*, 1 Hoff. Ch. Rep. 26. In *Flagg* v. *Mann*, 2 Sumn. 510, Mr. J. Story, seems to assume a different position, but what he says was a mere *dictum*; and as, in the equity courts of the United States, witnesses may be examined orally, and openly, it may have been that the objection was not stated *in limine*, before the examiner. In *Frank* v. *Mainwaring*, 2 Beav. 127, Lord Langdale, M. R. said: "As to the cross examination of the witness, I should hesitate in concurring in the doctrine, that a witness may be cross examined to any extent and for any purpose, without waiving the objection to his competency on the ground of interest. I do not however think, that ordinarily speaking, a mere cross examination is to be considered as amounting to a waiver of the objection, when the party does not know whether the witness is interested or not." It seems that the deposition of a witness taken after publication has passed may be read, when the opposite party has cross examined. *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. Rep. 339, 345.

(a) The report of this case, which the Master of the Rolls has allowed to be extracted from his MSS, is inserted here, as the judgment in it was the ground of the decision in *Bickley* v. *Guest*, which immediately follows.

1819.—West v. Berney.

Sir John Berney, being seised in fee under a settlement made in 1789, conveyed the estate to the use of himself for life; remainder to such one or more of his sons as he should appoint: remainder, in default of appointment, to his first and other sons in tail; remainder to himself in fee.

In 1811, on the occasion of the marriage of his eldest son, Sir John Berney was a party to a deed of settlement, to which the intended wife was also a party, and to a fine and recovery levied and suffered in pursuance thereof, whereby the estate was limited to the use of Sir John Berney for life; remainder to the use of Hanson Berney, his eldest son, for life; remainder to the first and other sons of Hanson Berney in tail, with divers remainders over. And in this deed a power was given to the trustees, authorizing them, at the request of Sir John Berney during his life, and, after his death, at the request of Hanson Berney, to sell the estate; and, after paying the incumbrances to which it was at this time *subject, to invest the produce in [*432] the purchase of other estates to be settled to the same uses.

Sir John Berney had not previously executed any appointment in favor of his eldest son; and a doubt occurring whether he might not still execute his appointment in favor of any other son, and so defeat the settlement, he, in 1815, executed a deed of appointment in favor of the eldest son in fee, reciting, that it was for the purpose of confirming the marriage settlement of 1811.

Against the title, it was urged by Mr. *Preston*, that the power of appointment in the deed of 1789 was merely collateral, and, being for the benefit of particular objects, was an interest in them, and in the nature of a trust in Sir John Berney, and, therefore, could neither be released nor extinguished by him; that the power of appointment remained in him, therefore, notwithstanding the settlement of 1811: and that it was not well executed by the deed of 1815, because the eldest son was not capable of receiving an interest in the estate inconsistent with the settlement of 1811. He cited Co. Litt. 237, *a.*, 265, *b.*, *Albany's case*,(*a*) and *Digges' case*.(*b*)

Mr. *Sugden*, who was also against the title, differed altogether in his argument from Mr. Preston. He admitted that the power was extinguished by the settlement of 1811: but insisted upon the form of the pleadings, that a good title could be made only for a certain term of 500 years, under which the plaintiff claimed. He relied upon *Albany's case* (*a*) and *Digges' case*;(*b*) and cited also *Leigh* v. *Winter*,(*c*) *Bird* v. *Christopher*,(*d*) [*433] *Edwards* v. *Slater*,(*e*) *King* v. *Melling*,(*g*) *Tomlinson* v. *Dighton*,(*h*) *Saville* v. *Blackett*,(*i*) *Morse* v. *Falconer*.(*k*)

The Vice Chancellor (Sir John Leach.)

In *Albany's case*(*g*) it was held, that the reserved power of the grantor

(*a*) 1 Rep. 111. (*b*) 1 Rep. 175. (*c*) Sir W. Jones, 411.
(*d*) Stiles, 389. (*e*) Hardres, 410. (*g*) 1 Vent. 225.
(*h*) 1 P. Wms. 149. (*i*) 1 P. Wms. 777. (*k*) 1 Anstr. 11. 3 Swanst. 429, n.
(*g*) 1 Rep. 111.

may be extinguished by his release. He took in the settlement an estate for life.

In *Digge's case*(*a*) it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and enrolled, was extinguished by his fine levied after a revocation, but before enrolment.

In *Leigh* v. *Winter*(*b*) it was held that the grantor could release his reserved power of revocation. He took by the settlement an estate for life.

In *Bird* v. *Christopher*(*c*) it was held that, if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished.

Edwards v. *Slater*(*d*) was cited for the able reasoning of Lord Hale upon the distinctions of powers; whose opinion seems to be, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appended to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, it may be destroyed by release, fine, or feoffment.

[*434] *In *King* v. *Melling*,(*e*) it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery.

In *Tomlinson* v. *Dighton*(*g*) it seems to be admitted, that where there is a devisee for life, with power to appoint her children, the power would be extinguished by a fine.

In *Saville* v. *Blackett*(*h*) it was held that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money by joining in a recovery and re-settlement of the estate, because he would otherwise defeat his own grant.

In *Morse* v. *Falkener*,(*i*) A. sold a copyhold estate to which he had no title. It afterwards descended upon him, and he died. On a bill by the purchaser against his heir, the court was of opinion that the purchaser would have had a personal equity, but doubted whether it could reach his heir.

Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such

[*435] case, his joining in a *conveyance of the land clear of the charge, would be a release.

I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him,

(*a*) 1 Rep. 173. (*b*) Sir W. Jones, 411. (*c*) Stiles, 389.
(*d*) Hardres, 410. (*e*) 1 Vent. 225. (*g*) P. Wms. 149.
(*h*) 1 P. Wms. 777. (*i*) 1 Anstr. 11, 3. Swanst. 429. n.

which may be released or extinguished. *Bird* v. *Christopher*. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate.

I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power.

Quere.—Could such a power in gross in a tenant for life be released? If he were grantor, it is decided by *Albany's case*(*a*) and *Leigh* v. *Winter*(*b*) that it could be released; and I think it may equally be released, if he is grantee; because his release must be to him who takes subject to the power; and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land. *Sed quere.*

*Mr. *Preston* admits all this reasoning as applied to general powers, [*436] but disputes it as to powers to appoint to particular objects, as children. Here, he says, the power is not an interest in the appointor but in the appointee, and is, therefore in the nature of a trust, which the trustee cannot release or extinguish.

It is not a trust, because the alleged cestui que trust cannot call for the execution of it. It may be exercised or not; and a dealing with the estate, inconsistent with the exercise of it, determines the option to exercise it. In *King* v. *Melling*,(*c*) the power was a particular power.

But this reasoning would apply to a power simply collateral. The difference, however, is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasable.

Mr. *Preston* urged the relief given against frauds upon the power; as in the case of an appointment by a father substantially to himself. This, however, does not prove the existence of a trust. It proves only that a power given for a particular purpose shall not by circuity be exercised for a different purpose.(*d*)

(*a*) 1 Rep 111. (*b*) Sir W. Jones, 411. (*c*) 1 Vent. 225.

(*d*) CUNYNGHAME v. THURLOW.

1832; February 15.

A fund being limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally, the father released the power as to a portion of the fund so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest; the court refused to order the transfer of this share to the father.

By an indenture bearing date the 29th of April, 1801, being a settlement made on the marriage

[*437] *It does not, upon the whole, appear to me to be a proper case to decide the general principle, that every power reserved by a grantor may [*438] be released or *extinguished, although he reserved no other interest in the estate,—or the other principle, that every grantee for life with a [*439] power in gross may in like manner release or *extinguish; although I was and am of opinion, that such two general principles are established. But I decide the case upon the ground that the settlement of 1811,

of Sir David Cunynghame, a sum of money was vested in trustees, upon certain trusts, for the husband and wife, and the survivor of them, and after the decease of the survivor, upon trust for all and every or such one or more child or children of the marriage, in such shares, &c. as the husband and wife during their joint lives, by any deed or deeds, with or without power of revocation, &c. should appoint, and, in default of and subject to such appointment, as the survivor of them should, after the death of the other, by deed or writing, with or without power of revocation, &c. or by will appoint, &c., and, in default of and subject to such appointment, for the children of the marriage, in equal shares; such shares to be vested interests in sons on their attaining twenty-one, and in daughters, on their attaining that age or marriage.

There were seven children of the marriage; one of them died in infancy; Edward, the eldest, attained twenty-one, and died, having bequeathed the residue of his personal estate to his brother David, and appointed executors, Robert, another of the children, attained twenty-one, and died, having appointed his father his executor, and bequeathed to him all his personal estate and effects.

Various instruments were executed in execution of the power, which were from time to time revoked. Finally, by a deed poll dated the 30th of May, 1831, Sir D. Cunynghame, who had survived his wife, appointed four equal fifth parts of the fund to his two daughters and an infant son, in equal shares, with a proviso, that none of these three children should claim any part of the fifth share remaining unappointed, without bringing his or her appointed share into hotchpot; and by the same instrument he released the unappointed share from his power of appointment.

The bill was filed by the father and all his surviving children, except the infant, together with the representatives of Edward, for the purpose of having the one-fifth of the fund, which remained unappointed, transferred to the father.

Mr. *Treslove* and Mr. *Round*, for the plaintiffs:—The effect of the appointment which has been made is to give four-fifths of the fund to three of the children, but in such a way as to exclude them from all possibility of interest in the remaining fifth part; for each of these three children takes under the deed of May, 1831, four-fifteenths, and if they were to bring their appointed shares into hotchpot, each would have only one-sixth. That the power is extinguished by the release is established by *Smith* v. *Death*,(a) and by the various cases cited in Sir E. Sugden's treatise. The remaining one-fifth, therefore, must go, after the father's death, to the other three children as unappointed, that is, to David, the executors of Edward, and Sir D. Cunynghame, as the executor of Robert. David and the executors of Edward are desirous that their shares of this one-fifth should be paid over to Sir David Cunynghame, who, as executor of Robert, is entitled to the remaining one-third of it, and is tenant for life of the whole.

Mr. *Preston*, for the trustees, denied that the power was extinguished by the release; and insisted, that, even if such a power could be extinguished, the donee of the power could not be allowed to release it so as to acquire an immediate benefit to himself; for here the power was released with no other view than that the father, as executor of the deceased son, who would take a vested interest in so much of the fund as was not appointed, might become entitled to that son's share.

The VICE-CHANCELLOR (Sir L. Shadwell) was of opinion that the power was extinguished by the release, but that the court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power.

The order, therefore, was, that only two-thirds of the remaining one-fifth (being the shares which had become vested in Edward and David should be paid to Sir David Cunynghame; and the remaining one-third of the unappointed share was to continue in the hands of the trustees.

(a) 5 Madd. 371.

was substantially and equitably an appointment by Sir J. Berney in favor of his eldest son, and that the limitations in the settlement were to be considered as limitations made by him.[1]]

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*Bickley *v.* Guest. [*440]

Rolls.—1831; March 15, 23.

Semble. Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished.

By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son, and one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l.* in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament, appoint; and in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises: held, that the power was extinguished by the fine.

By indentures of lease and release dated respectively the 11th and 12th days of April, 1783, the release being made between Thomas Bumpas and William Guest, of the first part, John Guest the elder, and Mary his wife, and John Guest, the son of John Guest the elder, of the second part, Rebecca Baylies, of the third part, and John Baylies and John Dolphin, of the fourth part, and being a settlement executed in contemplation of the marriage of John Guest the younger and Mary Baylies, John Guest the elder and Mary his wife, and John Guest the younger, did grant, bargain, and sell the lands and tenements therein described, situate in the parish of King's Norton, to hold the same unto John Baylies and John Dolphin, and their heirs, from and after the solemnization of the intended marriage, to the use of John Guest the elder and Mary his wife for their lives, and the life of the longest liver of them; and after the decease of such longest liver, to the use of John Guest the younger during his life, and after his decease, to the use of Mary Baylies during her life; and, after the *several deceases of the sur- [*441] vivor of them, John Guest the younger and Mary Baylies, to the use of John Baylies and John Dolphin, their executors, administrators, and assigns, for the term of 400 years, to commence from the day of the decease of the survivor of them, John Guest the younger, and Mary Baylies, upon the

[1] Vide *Badham* v. *Mee*, 1 Myl. & K. 32. *Hole* v. *Escott*, 4 Myl. & Cr. 187. S. C. 2 Keen, 444. *Piers* v. *Tuite*, 1 Dru. & Walsh, 279. *Jones* v. *Winwood*, 10 Sim. 250.

trusts thereinafter mentioned; and, after the determination of the term, and in the mean time subject thereto, to the use of the heirs of the body of Mary Baylies, by John Guest the younger, lawfully to be begotten, with an ultimate remainder to the use of John Guest the younger, his heirs and assigns: and it was declared that the term of 400 years, thereinbefore limited to John Baylies and John Dolphin, their executors, administrators, and assigns, was upon the express trust and condition, that, in case there should be issue of Mary Baylies on her body, by John Guest the younger lawfully begotten, a son, and one or more younger child or children, on the body of Mary Baylies by John Guest the younger also lawfully begotten, who should live to marry, or attain his, her, or their, full age or ages of twenty-one years, then and in such case it should be lawful for John Baylies and John Dolphin, or the survivor of them, or the executors or administrators of such survivors, out of the rents, issues, and profits of the said messuages, lands, and premises, or by sale or mortgage thereof, or of a sufficient part thereof, for all or any part of the term to levy and raise such sum and sums of money, not exceeding in the whole the sum of 200*l.*, as they, John Guest the younger, and Mary Baylies, should by any deed or writing during their joint lives, by them to be sealed and delivered in the presence of two or more credible witnesses, or in default thereof, as the survivor of them, John Guest the younger and Mary
[*442] Baylies *should, after the death of one of them, by any deed or writing executed as aforesaid, or by his or her last will and testament in writing, to be attested by three or more creditable witnesses, order, direct, or appoint, and, in default of such order, direction, or appointment, or subject thereto, after the moneys so appointed should be raised, and all costs and expenses of the trustees in and concerning the trusts, which the trustees were thereby also authorized to raise and pay to themselves, the term of 400 years, should cease or be assigned in trust to attend the inheritance of the premises.

In Easter term, 1793, a fine was levied by John Guest the elder and Mary his wife, which it was declared should enure to the uses of the settlement. The lands had previously stood limited to John Guest the elder for life, remainder to his wife Mary for life, remainder to the heirs of her body by John Guest the elder begotten, remainder to the heirs of John Guest the elder.

The marriage between John Guest the younger and Mary Baylies was solemnized. There were five children of the marriage who survived both parents, and, at the death of the father, had all attained twenty-one years of age.

Mary Baylies, the wife died in 1820, without having joined in any appointment of the 200*l.*; and in Michaelmas term, 1823, John Guest the younger, conceiving himself to be tenant in tail, leived a fine with proclamations to the use of himself in fee.

John Guest the younger, by his will dated the 19th of January, 1824, and attested by three witnesses, gave 100*l.* to his daughter Charlotte,

100*l.* to his daughter Mary, *and 200*l.* to his daughter Eliza- [*443] beth; all which legacies he charged on his freehold lands in the parish of Kingsnorton, and subject thereto he devised those lands to his eldest son John in fee; and he directed that these legacies should be accepted by his daughters in full compensation for any sum of money they might be entitled to under the marriage settlement, or by virtue of the term of 400 years therein created for raising portions for his younger or other children.

By a codicil he increased the amount of the sum given to Mary and Elizabeth, and expressly exempted his personal estates from the legacies charged on his lands in Kingsnorton.

The testator had no lands in Kingsnorton except those which were comprised in the settlement. He died in March, 1825. His eldest son then took possession of the lands in Kingsnorton as heir of the body of his mother, and refused to pay the legacies, inasmuch as his father, being only tenant for life, had no power so to charge the inheritance.

The daughters then insisted that the will amounted to an execution of the power, and was in effect an appointment of the 200*l.* among them in the proportions of their respective legacies; and, in January, 1828, the present bill was filed to have the 200*l.*, with interest, raised by virtue of the term of 400 years.

In the argument there was considerable discussion on various subordinate points; as, whether the entry of the tenant in tail, revesting his own estate, had any and what effect on the power; whether the term ceased by virtue of the proviso; whether the entry of the tenant in tail revested the term; whether time could run upon the *fine, pending the suit in [*444] equity; whether it was now too late for the termor to enter. But the material question, and that on which the decision ultimately turned, was whether the power was extinguished by the fine levied in Michaelmas, 1823.

Mr. *Pemberton* and Mr. *Rolfe*, for the plaintiff.

Mr. *Richards*, for a defendant in the same interest:—There can be no doubt that the testator meant to execute his power. He possessed no property in Kingsnorton, except what was subject to the power; the sums which he has disposed of are expressly directed to be raised out of that estate and by means of the term; and though larger than the power warranted, the appointment is void only for the excess, and to the extent of 200*l.* is a good execution. *Parker* v. *Parker*.(*a*) In creating these charges, the purpose of making provision for his younger children, as the power enabled him to do, was distinctly in the testator's contemplation; and the court, in construing an instrument which provides for the younger branches of a family, will restrict and cut down general expressions, in order to uphold it as a valid execution. *Bristow* v. *Warde*,(*b*) *Hinchinbroke* v. *Seymour*.(*c*) A power to

(*a*) Gilb. Equ. R. 168. (*b*) 2 Ves. jun. 336. (*c*) 1 Bro. C. C. 395.

appoint in favor of younger children is regarded as a species of trust imposing a moral duty on the parent, who is considered rather as a trustee for the exercise of the power for their benefit, than as having a discretion whether he shall exercise it or not; and in default of an appiontment, the children take. If a will be executed by the donee of a power in favor of such objects, the will is referred to the power, without which it could have no opera-
[*445] tion, and is treated as an *effectual appointment. *Bristow* v. *Warde*, *Brown* v. *Higgs*,(a) *Madoc* v. *Jackson*.(b) The court adopts the same principle as in trusts, and will not permit negligence or mistake in the parent, who is the trustee, to disappoint the interest of those for whose benefit the power was bestowed.

That would it of itself be a sufficient answer to any objection founded on the supposed effect of the fine; for the fine was unquestionably levied by the testator under the erroneous notion that he was tenant in tail; and equity would relieve from the consequences of the error. But whatever force such an objection might have had, if this were a mere general power to charge a sum of money, the fine cannot operate to destroy the power, where, as in the present case, a term, upon which the power attaches, has been created for the express purpose of bearing the charge. That term is now actually subsisting; and there is on the part of the testator, an explicit declaration of his will that it should be resorted to, in order to effectuate his purpose. In *Cross* v. *Hudson*(c) (the converse of this case) it was held, that where a power was defeated by the happening of a contingency subsequently to the execution of the will, the interest of the devisor, though at the date of the will, contingent only, should come in aid of the disposition, and enure to support the appointment. *Dobbins* v. *Bowman*(d) depended upon a similar principle. If, instead of being a joint power with remainder to the survivor, this power had been limited first to the husband and then to the wife, and if the husband,
[*446] after making an appointment by will, had *acquired the fee and died, could it be for a moment contended that it was still open to the wife to execute the power?

Mr. *Tinney* and Mr. *Jeremy*, contra:—By the fine levied after the death of the wife a tortious fee simple was gained; all the limitations existing under the settlement were displaced and devested;(e) and the power, which was annexed to the husband's life interest, was of course destroyed. It is incorrect to say that the term is still subsisting: in default of appointment (and here we contend that there could be no appointment after Michaelmas, 1823, and that there has been none,) it was to cease absolutely. This is a mere general power for raising a sum of money, not confined to children, or speci-

(a) 4 Ves. 708. 5 Ves. 495, 8 Ves. 561. (b) 2 B. C. C. 588.
(c) 3 Bro C. C. 31. (d) 3 Atk. 408.
(e) 1 Preston on Conveyancing, 207, where the authorities are collected. 1 Cruise on Fines and Recoveries, 343

fying any purposes, but to be exercised at the discretion of the husband and wife, and in favor of such objects as they or the survivor should think fit to select. If it had been otherwise, however, and if children had been designated as the objects, still it is expressly provided that, in the event of the power not being exercised, the legal estate on which it was to operate shall determine. In *Bristow* v. *Warde*, which was a case on marriage articles, there was an ultimate limitation to the children in default of appointment. Here the power is created not by articles, but by a deed, and the property, failing an appointment, is directed to go to the eldest son. Notwithstanding these special circumstances, even Bristow and Warde has been questioned; and Sir Edward Sugden, in his Treatise on Powers,(*a*) has observed that it must not be considered as establishing a general rule.

*When the testator made his will, devising several sums of money [*447] to his different children, he had no intention to execute the power. On the contrary, his intention was that the charges should be raised out of the fee simple which, he supposed, he had acquired by the fine. There is no direction to raise the money for the benefit of the younger children as such. The sums, which they were to receive respectively, varied considerably in amount, in the whole greatly exceeding the extent of the power; and there is neither principle nor authority upon which, if this will were held to be a good appointment of the 200*l.*, their several shares could be apportioned. The natural inference from all these circumstances is, that the devise was not intended, and cannot be considered, to be an execution of the power; and then as the term is gone, in the event of the party failing to appoint, it is impossible that an entry should survive it. The effect of an entry avoiding the fine could only be to revest the ulterior states, not those which were already at an end.(*b*) If, indeed, this were a power simply collateral, no act of the donee could effectually bar it; but the power is coupled with an interest; and it has been determined in *Smith* v. *Death*,(*c*) in conformity with the previous decision in *West* v. *Berney*,(*d*) that the power of a father, who is himself tenant for life, to appoint in favor of children may be destroyed by the acts of the donee. *Smith* v. *Death* was followed by Sir T. Plumer in *Horner* v. *Swann*.(*e*) The authorities cited from Atkyns and Brown having no bearing on the question, inasmuch as they apply only to cases in which the testator had a power *of appointment, subsisting at the time of the [*448] execution; whereas here it was absolutely gone.

Mr. *Whitmarsh*, for the trustees.

Mr. *Pemberton*, in reply. The term has not ceased, even granting that the power was never exercised. Failing any appointment, the trusts are to determine; but the term itself continues to subsist, it being kept alive for the benefit of the trustees to reimburse them for the costs they may have incurred in

(*a*) Sugden on Powers, p. 463, n. 4th ed.
(*b*) 1 Preston on Conveyancing, 247. (*c*) 5 Madd. 371.
(*d*) Referred to in Sugden on Powers, p. 80, 4th edit., and reported ante, p. 431.
(*e*) 1 Turn. & Russ.

performing their office; and subject to that charge, it is directed to be assigned. It is impossible to doubt the testator's intention; for he expressly declares that the larger sums given by his will shall be taken in satisfaction of the smaller sums, which, under the marriage settlement containing the power, he might have appointed to his children. The father died in March, 1825, and in January, 1828, the present suit was instituted. *Pincke* v. *Thornycroft* (*a*) has decided that the filing of a bill is in some cases equivalent to an entry; or, at all events, that the court will not allow a fine to be set up as a bar, especially where the non-claim has run during the pendency of the suit. *Baker* v. *Pritchard*,(*b*) *Dormer* v. *Fortescue*.(*c*)

This cannot be considered as a general power. It was a power reserved to the husband and wife by the contract of marriage; and was made to depend on the contingency of there being issue of the marriage other than a son and of such issue attaining an age which would make a provision for them necessary. It has never been determined that such a power is extin-
[*449] guished *by a fine.(*d*) *Smith* v. *Death* proceeded on the ground that the donee of the power had determined his option, by dealing with the estate in such a manner as gave to other persons interests inconsistent with the exercise of the power.

March 23.—The Master of the Rolls stated, that in this case a tenant for life, with a power to charge the estate after his death for the benefit of his children, levied a fine with proclamations, and afterwards made his will in execution of his power; and that the material question in the cause was, whether the power was destroyed by the fine?

His Honor then read a very full note of the case of *West* v. *Berney*, in which all the leading authorities on the point were referred to, and commented on by him, and in which he had expressed a decided opinion, although ultimately the case went off upon another ground, that such a power would be destroyed by a fine; and he stated that, upon re-consideration, he continued of the same opinion.

The bill was dismissed, without costs.

(*a*) 1 Bro. C. C. 289. 4 B. P. C. 92, Toml. ed.
(*b*) 2 Atk. 387.
(*c*) 2 Atk. 282.
(*d*) See *Jesson* v. *Wright*, 2 Bligh, 8.

*COMBER v. GRAHAM. [*450]

ROLLS.—1830; March 18.

Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period.

THE will of A. D. Bradshaw, after giving to his mother and his wife a life interest in all his effects, with the remainder, after the death of either, to the survivor for her life, continued as follows:—"After whose decease I give and bequeath the principal from which such interest may have arisen to such child or children as I may have, in equal proportions, whom all failing, after the death of my said mother and wife, I give and bequeath the principal from which such interest will have arisen in the following manner; first, I reckon my property at present not much under 2000*l.*, and as I have been honored with Lord Adam Gordon's patronage during the period of my accumulating it, I therefore give and beqeath to the Right Hon. Lord A. Gordon the sum of 2000*l.*; but as this would be an empty compliment, considering the possibility of either my wife or myself surviving him, I therefore hereby confirm the disposal he may make by will of the above sum of 2000*l.*, the same as if he had succeeded to it during his life, and after the decease of my mother and wife and failing of children as aforesaid: provided he does not bequeath or leave it, or any of it, to my uncle Sir A. S., or to either of the brothers of my wife, or in such manner that the descendants of any of the said excepted persons shall become possesed of it."

The testator died in 1781, leaving no issue. In 1787, Lord A. Gordon, in the lifetime of the testator's mother and widow, assigned his reversionary legacy of 2000*l.* to a person whose interest was now represented by the plaintiff. The only question was, whether the *assignment, be- [*451] ing made during the lives of the tenants for life, was a valid disposition of the legacy?

Mr. *John Wilson*, for the plaintiff, contended that the sum bequeathed to Lord A. Gordon was effectually passed by his assignment. The language of the will was founded on a mistaken idea that, during the existence of a prior life interest in the legacy, it could not be effectually aliened by the legatee; and the object of the testator, who had previously made the bequest in words which of themselves were sufficient to confer an absolute interest, was simply to enlarge the gift, by adding to it (what he did not know would be implied,) a power of testamentary disposition. *Robinson* v. *Dusgate*,(a) *Maskelyne* v.

(a) 2 Vern. 181.

Maskeyne.(*a*) The subsequent clause, excluding certain specified individuals from the benefit of that power, was a valid condition,(*b*) and by no means incompatible with a wish on the part of the testator that the legatee should enjoy a right of alienation in other respects unlimited.

Mr. *Bickersteth* and Mr. *Le Marchant*, for the personal representatives of the testator, insisted that the will was obviously framed upon the notion that Lord A. Gordon would take no more than a contingent interest, unless he survived the mother and the widow; and as the testator, when his purpose was to enhance the value of the gift by enabling the legatee to dispose of his interest during the supposed contingency, only gave him a power of disposition by will, and that too a power limited in its objects, as well as in the manner of its exercise, the implication was irresistible that he meant to bestow no larger power than was conferred by express words. A contrary construction was directly opposed to the intention and would render the cautious provisions of the will not merely superfluous, but nugatory. What availed the prohibition against a bequest to any of the excepted persons, if the legatee were to be at liberty, notwithstanding, to convey his interest by a deed? *Mackell* v. *Winter*(*c*) was referred to.

[*452]

Mr. *Barber*, for other parties.

The Master of the Rolls was of opinion, that under the first words of the bequest Lord A. Gordon took an absolute interest in the legacy; and that, inasmuch as the subsequent clause, empowering him to dispose of it by will, was evidently intended to enlarge instead of abridging the extent of the interest previously given, Lord A. Gordon was not thereby precluded from assigning his legacy by a deed *inter vivos*, executed while the mother and widow of the testator were still living.[1]

(*a*) Amb. 750. See also *Hales* v. *Margerum*, 3 Ves. 299. *Nannock* v. *Horton*, 7 Ves. 391. *Hixon* v. *Oliver*, 13 Ves. 108.

(*b*) Litt. § 361. *Large's case*, 2 Leon. 82. 3 Leon. 182.

(*c*) 3 Ves. 236, 536.

[1] Vide *Bourn* v. *Gibbs*, post, 614. *Reith* v. *Seymour*, 4 Russ. 263. *Archibald* v. *Wright*, 9 Sim. 161, 165.

*Campbell v. Graham. [*453]

Rolls.—1830; March 4, 5, 8. L. C.—1831; July 15, 16, August 23.

A testator domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C., and M. C. persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds which the will specified. At his death which happened in Scotland in 1790, no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which a year after the testator's death, including interests, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy executions upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees, came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C. the other legatee; and he, in the year 1821, when administration was for the first time taken out of the testator's estate in England, filed the bill for the purpose of enforcing payment.

Held, that the legacies were demonstrative only, and were not to be considered as having been adeemed:

That as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate, at the time of payment.

That J. C. must be considered as having been paid his legacy by retaining the amount out of the bond debts, and that that amount was to be deducted, first from the interest, and then *pro tanto* from the principal due from him upon the bonds, as at the end of a year after the death of the testator; and interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, and no further:

That such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee: and,

That the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand ought to be presumed to have been satisfied.

William Graham, who, at the date of the will and codicil, and for many years previously, was domiciled in the island of Jamaica, and possessed of considerable property there, by will dated the 17th of June, 1768, bequeathed to John Campbell, of New Hope in Jamaica, the sum of 1000*l.* Jamaica currency; and to Henrietta Campbell and Margaret Campbell (afterwards Hay) the sum of 500*l.* each, like currency: and he desired that these legacies should be paid out of the *money due to him on bonds from the [*454] said John Campbell and his mother. The testator afterwards, by a codicil dated the 13th of June, 1772, gave to the same John Campbell 1000*l.* Jamaica currency, over and above his former legacy.

The testator died in Scotland on the first of December, 1790. John Campbell, Henrietta Campbell, and Margaret Campbell, the legatees, were brother and sisters; they were all natives of Jamaica, and were domiciled there at the time when the testator made his will and codicil. About the year 1790, John Campbell quitted Jamaica, and neither he nor Margaret Campbell who had previously left the island, ever returned to it. None of the executors proved the will; but in August, 1791, administration, with the will and codicil annexed, was duly granted in Jamaica to James Graham, as the attorney in

that island of the testator's next of kin; and afterwards, letters of administration *de bonis non* of the testator's personal estate in Jamaica were, in the years 1793, 1794, and 1818, successively granted to persons therein described as the attorneys in Jamaica of the testator's next of kin residing in Great Britain. There was no personal representative of the testator in this country till the month of November, 1821, when the defendant, William Graham, took out administration to the personal estate and effects in England. John Campbell the legatee, died in the year 1801, and in October, 1803, administration of his personal estate, with his will annexed, was granted in Jamaica to the plaintiff, John Graham Campbell, his son, who, after several intermediate representations taken out here, obtained, in May, 1810, administration *de bonis non* of his father's personal estate from the perogative court of Canterbury.

[*455] *By an indenture of the 14th of December, 1818, made between the said Henrietta Campbell and Dame Margaret Hay, widow, formerly Margaret Campbell, of the one part, and the plaintiff, J. G. Campbell, of the other part, after reciting that the said two legacies of 500*l.* and 500*l.* were then due to Henrietta Campbell and Margaret Hay respectively, they, in consideration of 25*l.* to each of them paid by the plaintiff, J. E. Campbell, and also in consideration of natural love and affection to him as their nephew, assigned to him their said several legacies for his own use, together with all interest accrued or that might thereafter accrue due thereupon.

The bill, which was filed in the year 1821 by John G. Campbell against William Graham as the personal representative of the testator, charged that assets had come into the defendant's hand, over and above the judgments afterwards mentioned, sufficient to satisfy the testator's debts and legacies, and it prayed an account and payment of the sums bequeathed to John Campbell and his sisters. The answer merely stated the defendant's belief that the testator's assets, including therein the sums due in respect of those judgments, were more than sufficient to satisfy all the outstanding demands against the testator's estate.

Under an order in the cause directing the master to inquire and report whether the said legacies of 1000*l*, 1000*l*., 500*l*., and 500*l*. or any and what parts thereof respectively were then due and payable, and if necessary to take an account of what was due for principal and interest in respect of them, with liberty to state any special circumstances, the facts above detailed were found by the report.

[*456] *The master also found that the value of the legacies, all of which, together with the interest, he certified to be still unpaid, ought to be ascertained, not according to the then present current rate of exchange, which was twenty-two and a half per cent. above par, but according to the established par of exchange between Jamaica and British currency, that being in the proportion of 140*l.* currency to 100*l.* sterling; and that there was, therefore, due to the plaintiff on account of the four legacies in question, including

interest thereon at 4 per cent. from the end of a year after the testator's death, the sum of 5243*l.* 15*s.* 11*d.* sterling.

It did not appear whether at the date of the will any money was due to the testator on bonds from John Campbell and his mother; and the report took no notice of the existence of any such bonds. But the master stated that, in the months of October, 1773, and March, 1774, respectively, John Campbell himself executed to the testator two several bonds with penalties of 5272*l.* and 1400*l.* to secure the repayment of 2632*l.* and 700*l.* sterling with interest; that neither of these sums had ever been paid; and that soon after the testator's death, his personal representative commenced actions upon the bonds in the supreme court of Jamaica against John Campbell, and on the 2d of June, 1794, recovered judgments for the full penalties and the costs, amounting together to the sum of 6703*l.* 5*s.* sterling.

The master found that, under a decree made in a creditor's suit against the personal representatives of the said John Campbell, deceased, and in which the defendant, William Graham, was plaintiff, and the plaintiff, John G. Campbell and others were defendants, the sum of 6703*l.* 5*s.* sterling was reported to be then due to *Graham in respect of the aforesaid [*457] two judgments; that Graham excepted to the report, and in addition to that sum claimed interest thereupon at six per cent. from the 2d of June, 1794, but that the exception was overruled; that other accounts and inquiries were then directed, and some further proceedings were had, but that no subsequent report was ever made in that cause.

The master further found that, by an indenture dated the 20th of August, 1828, made between the plaintiff, J. G. Campbell and the defendant William Graham, for the compromise of the cause of *Graham* v. *Campbell*, the said J. G. Campbell agreed to take upon himself the payment of the sum of 6703*l.* 5*s.*, together with the costs of that suit, after deducting what, if any thing, should be found due to him in the present cause of *Campbell* v. *Graham*, in respect of the said several legacies and of the costs.

The report also set forth the affidavit of the defendant William Graham, in which he stated, that he never heard of any claim or demand in respect of the said legacies till the year 1817, although in 1794 the said bonds had been put in suit in Jamaica, and judgments been there obtained upon them; but that such claim was first brought forward, on the plaintiff being pressed for the settlement of the bond debts.

The master reported that it did not appear to him that the legacies were to be considered as having been adeemed or satisfied; or that no interest was due upon them: or that the principal thereof should be set off and deducted from the amount due to the defendant upon the said bonds and judgments, as on the first of December, 1791—one year after the testator's death,— and the interest be thereafter calculated upon the amount *which [*458] would then remain due upon the said bonds and judgments, until the same should amount to the said sum of 6703*l.* 5*s.*; or that although inter-

est was calculated upon the said legacies, it should in like manner be calculated upon the said sum of 6703*l.* 5*s.*

To this report the defendant took, among others, the following exceptions :—

I. Because the master had certified that it did not appear to him that the legacies were to be considered as having been adeemed, or paid and satisfied.

II. Because he had not certified that the principal of the legacies of 1000*l.* and 1000*l.* should be set off and deducted from the amount due to the defendant upon the bonds and judgments as on the 1st of December, 1791 ; and that interest should be thereafter calculated on the amount remaining due on the said bonds and judgments after such deduction, until the same should amount to 6703*l.* 5*s.*

III. Because he had not certified that the principal of the legacies of 500*l.* and 500*l.* should in like manner be deducted from the amount due to the defendant, as on the 1st of December, 1791, &c. (as in the foregoing exception.)

IV. Because he had calculated the value of the legacies, and of the interest thereon, not at the rate of twenty-two and a half per cent. premium on the sterling value of bills of exchange drawn in Jamaica upon England, but according to the ordinary par or rate of exchange between the two countries.

Mr. *Pemberton* and Mr. *Simkinson*, for the exceptions. The [*459] *long interval of time that has elapsed between the death of the testator and the filing of the bill, raises an irresistible presumption that all these legacies have been already satisfied. The legatees were nearly related to the testator : they resided in the same country with him, and they could not possibly be ignorant of their rights under his will. The reasonable inference is, that they either received payment of their several legacies, from some of the various individuals who successively administered to the estate in the West Indies, or that they intended and consented to give up their claims. But whatever be the fact, it is a sufficient answer to the plaintiff to say, that seven and twenty years have been suffered to pass, without a demand made, or any circumstance shown to account for the delay. *Pickering* v. *Stamford*,(*a*) *Jones* v. *Turberville*,(*b*) Roper on Legacies.(*c*)

The legacies given by the will are specific. They were payable out of certain moneys then due to the testator upon the bonds of John Campbell and his mother. The report is altogether silent as to those bonds ; and it does not appear that when the testator died, any such bonds were outstanding. The presumption is, that they had been paid off ; and the bequests charged upon them, therefore, must be considered as adeemed.

If any of these legacies, however, can now be regarded as existing demands, those to John Campbell ought certainly to be set off *pro tanto* against the sums due from Campbell upon the bonds, as at the end of a year after [*460] the testator's death. Those bond debts were assets in *the debtor's hands applicable to the payment of his legacies, and more than ade-

(*a*) 2 Ves. jun. 272, 581. 4 Bro. C. C. 214. (*b*) 2 Ves. jun. 11. 4 Bro. C. C. 115.
(*c*) Vol. I, p. 791.

quate for that purpose; and he must, therefore, be taken to have so applied them. *Jeffs* v. *Wood*,(*a*) *Ranking* v. *Barnard*,(*b*) *Ex parte O'Ferrall*.(*c*) In like manner the 500*l*. legacies subsequently assigned to the plaintiff ought to be set off and deducted from the amount, which, as the personal representative of John Campbell, he then owed to the testator's estate.

The principle upon which the master has proceeded in taking the account works gross injustice. He has not computed interest upon the bond debts beyond the penalties, and as they carried 6 per cent. interest, they must have reached the amount of the penalties before the testator's death, or, at all events, before the judgments were recovered in the actions; whereas in calculating what is due upon the legacies, he has allowed interest at 4 per cent. from a year after the testator's death till the present time, a period of nearly forty years. There is no inflexible and peremptory rule in equity, that the moment the sum secured by a bond amounts to the penalty, interest shall cease to run. Lord Eldon, in *Grant* v. *Grant*,(*d*) expressly repudiated that doctrine. The manifest unfairness of applying the ordinary rule to a case circumstanced like the present, justifies the court in departing from it, and allowing interest beyond the penalty. *Clarke* v. *Seton*,(*e*) *Tew* v. *Winterton*.(*g*) At any rate if the sum due in respect of the legacies be retained and set off *pro tanto* against the bond debts, assuming that, at the time when the legacies became payable, those debts equalled the amount of the [*461] penalties, interest must be suffered to run upon the balance till the sum again reaches that point.

The effect of computing the value of the legacies in Jamaica currency according to the nominal, and not the real par of exchange, is to impose upon the testator's estate an additional charge of twenty-two and half per cent. the *extra* cost of remitting the amount to England.

The Master of the Rolls said, that upon several of the points raised he could not entertain a doubt. The sums bequeathed by the will were not specific but demonstrative legacies, and could not be considered as adeemed.[1] The assignee of a legacy continued, until it was paid, to stand

(*a*) 2 P. Wms. 128. (*b*) 5 Mad. 32. (*c*) 1 G. & J. 347.
(*d*) 3 Russ. 598. (*e*) 6 Ves 411. (*g*) 3 Bro. C. C. 489. 1 Ves. jun. 451.

[1] A testator devised a certain estate to trustees for sale, for payment of his debts and legacies, in exoneration of his personal estate; and after reciting that he became entitled on his marriage to a sum of 7442*l*. of which he had received 2442*l*. and the 5000*l*. remained due, he bequeathed 2442*l*. to be paid out of the produce of the said estate, and the sum of 5000*l*. when and if the same should be received and got in, but not otherwise, to four persons equally; and in case the 5000*l*. should be received by him in his lifetime, he directed the same to be raised out of the said devised estate. The testator received the 5000*l*.; and it was held, that the legacy was demonstrative, and was a charge upon the general personal estate, as well as upon the devised estate. *Colville* v. *Middleton*, 3 Bea. 570. A gift to A. B. "of the sum of 100*l*. which said sum is owing to me, by bond, from her father," was held a specific and not a demonstrative legacy; for these words "which said sum is owing to me," show distinctly that it was the sum owing on the bond which was specifically bequeathed. *Davies* v.

precisely in the same situation as the assignor had done;[1] and in that respect the case of *Jeffs* v. *Wood* had no application. The argument upon the rate of exchange was wholly beside the question. The legacies were to be paid out of assets in England, where the defendant had taken out administration to the estate, so that there could be no expense of remittance. The third and fourth exceptions must therefore be overruled.

Mr. *Tinney*, Mr. *Rennalls*, and Mr. *Rolfe*, for the plaintiff, upon the first and second exceptions:—The circumstances sufficiently explain the conduct of the legatees in so long neglecting to claim their legacies. The parties were all resident in this country at the time when the testator died, and although a regular series of administrations was taken out to his estate in the West Indies, he had no personal representative in England till the year 1821; nor were there any assets out of which the judgment could be satisfied. John Campbell could not take a single step in compelling [*462] payment of his legacies *without being himself called upon to discharge the larger sum due on his bonds to the estate of the deceased. It was not his interest to stir in the matter, and, consequently, the presumption, which is founded on its being for the party's own benefit to enforce payment, entirely fails. The objection, however, if it could be maintained, comes with a bad grace from one who himself seeks to set up a counter demand, the origin of which is carried twenty years farther back. As to the legacies assigned to the plaintiff by his aunt, it is not very surprising that those ladies should be unwilling to resort to legal proceeding against a relative for sums not exceeding 350*l.* sterling to each of them, especially as such proceedings, in order to be effectual, must have been carried on in a foreign court, by some person holding a power of attorney to act on their behalf.

The bond debts must have reached the full amount of the penalties at the time of the testator's death in December, 1790, or at the end of a year afterwards, certainly long before the judgments were recovered in the actions. No authority can be produced to warrant the court in implying a retainer of the kind now contended for. In the cases referred to, the executor insisting upon the set-off, always admitted assets. That was done expressly in *Jeffs* v. *Wood*.(*a*) Unless, indeed, there be an admission of assets, or an assent signified by the personal representative, a legatee can have no right to claim satisfaction of his legacy by way of retainer, till all the debts are discharged and the fund is clear. Here so far from there being any such assent

Morgan, 2 Beav. 405. As to ademption of legacy, see *Sheffield* v. *The Earl of Coventry*, 2 Russ. & M 326. *Pattison* v. *Pattison*, 1 Myl. & K. 12. *Hayes* v. *Hayes*, 1 Keen, 97. Of portion, see *Powys* v. *Mansfield*, 3 Myl. & Cr. 366. *Pym* v. *Lockyer*, 5 Myl. & Cr. 29; 3 Myl. & Cr. 379, n. 1. *Stocker* v. *Harbin*, 3 Beav. 484.

[1] As to assignment of legacy, see *Comber* v. *Graham*, ante, 450.

(*a*) 2 P. Wms. 128.

or admission, the administrator in Jamaica brought actions and recovered judgments for the full penalties; a *circumstance proving, [*463] if evidence were necessary, that no payments had ever been made in respect of the bond debts. When those debts reached the amount of the penalties, interest from that moment ceased to run upon them; and having once stopped, it could not revive, when the deduction caused by a set-off implied at the end of a year after the testator's death, reduced the total sum due below that amount.

The Master of the Rolls:—The single question is, whether the delay that has taken place here, is or is not satisfactorily explained; and I am of opinion, that as far as relates to the legacies given to John Campbell, that delay is satisfactorily explained. It never was Campbell's interest to settle the account with the representatives of Graham; because, upon such account, a considerable balance would have been found against him; and if he had called upon them for satisfaction of his legacy, he must necessarily have come to a settlement of the general account and have paid the balance. The circumstances referred to in the argument in no way affect this reasoning. In the year 1794, four years after the testator's death, his personal representative in Jamaica brought actions against Campbell for a large sum alleged to be due upon two bonds, and recovered judgments in respect of those bonds. It is said that Campbell's attention must have been then called to the subject of his counter demand, and that, though he could not have claimed to set it off in the actions, he might still have availed himself of the same benefit, by a bill in equity filed in Jamaica. And it is no doubt true that he might have so done; but he must in that case have submitted to pay the balance due from him on the account: and it is plain, that, from the year 1794 down till the present time, the judgments recovered against Campbell have been wholly unavailable to the testator's estate.

*There is much greater difficulty with respect to the legacies of [*464] 500*l.* given to Henrietta Campbell and Margaret Hay. The only reason assigned why these legacies were not sooner demanded, is, that the legatees left the island of Jamaica where the assets of Graham were to be administered, and came to England with their brother; a fact which the master has found with respect to one of the sisters, and which, as they both formed part of John Campbell's family, may not unnaturally be presumed with respect to the other. Another reason, which was not suggested at the bar, seems very possible, namely, that there were not assets forthcoming. It was at first alleged, that the answer of the defendant contained an unqualified admission of assets. On examination, however, the passage will be found to amount to nothing more than an admission, that if the representatives of Graham should recover the sums due on bond from the representatives of Campbell, there would then be sufficient funds to satisfy the legacies. Upon these grounds I am disposed to think that the master, in allowing the claim for

these legacies, has followed the safer course; and the exception must, therefore, be overruled.

Upon the question raised by the other exception, I think I must assume (what indeed appears to be conceded,) that, at the time of the testator's death, or at the end of a year afterwards, when the right to receive the legacies accrued, the principal and interest due upon the bonds amounted to the penalties; and, assuming that to be the fact, my opinion is, that the master's calculation cannot stand, but that the amount of the two sums bequeathed to John Campbell must be considered as giving him a right of retainer as at the end of one year after the death of the testator, and that the debt due from him must be computed upon the principle of such retainer. Whether [*465] or not the debt is then *to carry interest till it again reaches the amount of the penalty, is a question which I should wish to have further inquired into before deciding the point.

March 8.—The point reserved at the hearing was again argued at some length. *Clarke* v. *Seton*,(*a*) and *Doran* v. *O'Reilly*,(*b*) were the only cases referred to.

THE MASTER OF THE ROLLS:—It does not appear to me, that the cases proceed upon any other principle than that the master is not to compute interest beyond the amount of the penalty.

I am of opinion, that when these legacies became payable, which was at the end of one year after the death of the testator,[1] they are to be considered as paid, that is to say, they are claims which the debtor then had on the creditor, and which, therefore, he was entitled to set off at that time.[2] I am also of opinion that the retainer operates in the same way as if payment had been then made, and that the obligee of the bonds had a right to apply that payment, first in discharge of the interest, and then *pro tanto* in reduction of the principal.[3]

(*a*) 6 Ves. 411.

(*b*) 3 Price, 250. Most of the cases on the subject are collected in Mr. Raithby's note to *Hale* v. *Thomas*, 1 Vern. 350. See also *Crispe* v. *Blake*, 1 Ch. C. 23. Ca. T. Finch, 89. *Maclure* v. *Dunkin*, 1 East, 436.

[1] Vide *Williamson* v. *Williamson*, 6 Paige, 298. *Sullivan* v. *Winthrop*, 1 Sumn. 16. 19. *Marsh* v. *Hague*, 1 Edw. Ch. Rep. 175.

[2] "It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt."—Lord Cottenham. *Cherry* v. *Boultbee*, 4 Myl. & Cr. 442, 447. S. C. 2 Keen, 319.

[3] In the absence of an agreement, a creditor receiving a partial payment of a debt, has the right of applying it first, to the satisfaction of the interest then due, before it is applied to discharge any part of the principal. *Hart* v. *Dewy*, 2 Paige, 207. And see *The State of Connecticut* v. *Jackson*, 1 Johns. Ch. Rep. 17. *Stoughton* v. *Lynch*, 2 Johns. Ch. Rep. 209. *Williams* v.

Although the judgments recovered in the actions brought in 1794, were taken for the full penalties, they formed, in truth, a security only for the amount of the sums which might then be due upon the bonds; and the principal sums so remaining due would carry interest, until the amount of that interest, together with *the principal, was equal to the penalties, a [466] point which was expressly decided in the case of *Clarke* v. *Seton*.[1]

By the decree it was declared, that "the amount of the two several legacies of 1000*l*. and 1000*l*. Jamaica currency, certified to be due to the plaintiff John G. Campbell, as administrator of John Campbell deceased, is to be considered as giving to the legatee a right of retainer as on the 1st of December, 1791, being the end of one year after the death of William Graham, the testator, to the amount of the said two legacies, out of the debt due by the said John Campbell, deceased, to the said William Graham, deceased, upon the bonds on which the judgments in the pleadings mentioned were obtained; and to be considered as applied first in payment of the interest, and the remainder, if any, in payment of the principal of the said debt; and that the account between the parties is to be computed upon the principle of such retainer; and that it be referred back to the master to inquire and ascertain what was due upon the said judgments on the 2d day of June, 1794, when they were obtained, having regard to the declaration hereinbefore contained as to the right of retainer in respect to the said two legacies; and the said master is to compute interest on what he shall so find to be due on the said 2d day of June, 1794, upon the said judgments, from the said 2d day of June, 1794, until the amount due on the said judgments, together with the costs therein mentioned, shall have reached the sum of 6703*l*. 5*s*. sterling, being the amount of the penalties of the said bonds, and of the said costs," &c.

1831; *July*, 15, 16.—Both parties presented petitions of appeal.

*On the rehearing of the exceptions before the Lord Chancellor [*467] three questions only were argued: first, with respect to the set-off; secondly, upon the effect of laches in barring the claim of the legatees; and, thirdly, as to the correctness of the master's calculation of the value of the legacies.

Mr. *Tinney*, Mr. *Rennalls*, and Mr. *Rolfe*, for the plaintiffs:—The master was right in computing what was due in respect of J. G. Campbell's legacy at the time when the bill was filed, and deducting the amount from the judg-

Houghtaling, 3 Cow. 87. n. a. *Lightfoot* v. *Price*, 4 Hen. & Mun. 431. *Lamott* v. *Sterrett*, 1 Harr. & Johns. 42. *Yancey* v. *Mutter*, Cam. & Norw. (North Carolina) Rep. 513. *Black* v. *Blakeley*, 2 McCord's (South Carolina,) Rep. 10. *Wright* v. *Wright*, id. 204.

[1] When interest is recoverable beyond the penalty of the bond, see *Grant* v. *Grant*, 3 Russ. 598. 612. n. 1. S. C. 3 Sim. 340. The lien of a mortgagee extends to the whole amount of principal and interest due, although they may exceed the penalty of the bond. *Mower* v. *Kip*, 6 Paige, 88. S. C. 2 Edw. Ch. Rep. 165.

ment debt. That the one claim carried interest at four per cent. while the other carried no interest was an accident, which here is favorable to the legatee; but the advantage might have been the other way. Suppose, for example, the debt, instead of being secured by a judgment, had been due upon a bond bearing interest at five per cent., could the legatee have then insisted as a matter of course on having his legacy set off, as at the date of the testator's death, or at the end of a year afterwards, against the money due upon the bond? The doctrine has never gone to that extent. Though recognized in equity long before the legislature ventured to make it available at law, the application of set-off has been always founded on mutual dealings and on some evidence, however slight, of the assent or contract of the parties. *Curson* v. *African Company*,(a) *Hawkins* v. *Freeman*,(b) *Carr* v. *Taylor*,(c) *Ex parte O'Ferrall*.(d) In *Jeffs* v. *Wood*,(e) which was much relied upon in the court below, the circumstances *are incorrectly stated: [*468] the judgment really turned upon an agreement, and the executor besides had admitted assets. But, so far as it seems an authority for applying the doctrine generally, wherever there are opposite debts, without proof of understanding or intent, it is contradicted by the later cases of *Pegg* v. *Green*(g) and *Whitaker* v. *Rush*.(h) A legatee never can be permitted to pay himself by retaining the value of his legacy out of a debt, unless the personal representative has given his assent, or has distinctly admitted assets. Till then there are no mutual demands; for the legatee is a mere volunteer, and the executor, who takes upon himself to authorize such a retainer before all the testator's debts are satisfied, incurs the hazard of committing a *devastavit*. It is an option, therefore, which can belong only to the personal representative, and his right must stand upon the same footing as that of any other person who unites the character of debtor and creditor of another. The party, who would have the benefit, must declare his election; he must either adopt his right at the moment when the mutual claims arise, or he is presumed to reject it. Here the administrator rejected it, for he insisted on full satisfaction of the debt, and, in the actions brought upon the bonds judgments were recovered for the whole amount of the penalties. It is impossible, upon principle, that set-off should be applied by relation to any antecedent period, unless there has been some intimation of intention; nor can any precedent be produced for giving it a retrospective operation. It can only take effect from the time when the plaintiff by filing his bill asserted the existence of a cross demand. Why should the end of a year after the testator's death be fixed upon as the time for striking the balance between the counter-claims rather than any other period?

[*469] *The administrator, by his answer to the bill, did not set up time

(a) 1 Vern. 121. The principle cases on the subject are collected in the note.
(b) 8 Vin. Ab. 560. (c) 10 Ves. 574. (d) 1 G. & J. 347. (e) 2 P. Wms. 128.
(g) Mos. 185. (h) Amb. 407.

as a defence, but resisted the payment on quite a different ground,—that the legacies were not general legacies, but specific, and that no bonds could be found to satisfy them. The denial of the validity of a claim is a circumstance that rebuts the presumption of satisfaction raised by the lapse of time. *Reeves* v. *Brymer*.(*a*) No administration was taken out in England till 1821, and till then, consequently, there was no person upon whom the demand could be made. Where the statute of limitations has been set up against a claim, it has been decided that no cause of action accrued, until there was an administration to the estate of a party in whose right the action was brought. *Murray* v. *East India Company*.(*b*) The same rule must apply where the party against whose estate a demand is made, has been unrepresented for a series of years. Here there was no fund out of which the legacies could be paid; for the assets were not collected, and of course could not be distributed till the year 1821. It is true that length of time will raise a presumption of the payment of legacies: thus in *Pickering* v. *Stamford* (*c*) it was said that had that been the case of a legacy, thirty-five years would have been a bar; and in *Jones* v. *Turberville* (*d*) a legacy was presumed to be satisfied after forty years. *Hercy* v. *Dinwoody*.(*e*) In fact, a much less time would be sufficient to raise the presumption in the absence of all circumstances to rebut it; for as a legacy is in the nature of a simple contract debt, six years, and not twenty, would be the period of limitation against the demand of the legatee. But in this case there are abundant circumstances to repel the presumption of payment; for besides the impossibility *of making [*470] the demand while the estate of the testator was not administered to, the absence of a creditor in a foreign country is of itself sufficient to prevent the statute of limitations from running, and by analogy from raising a presumption of payment as against the legatees. *Fladong* v. *Winter*.(*g*)

In *Cockerell* v. *Barber* (*h*) Lord Eldon has distinctly laid down that a legacy in foreign specie must be paid in this country according to the current value of that specie, without any reference to the rate of exchange, or, what was the same thing, the expense of remittance. *Raymond* v. *Brodbelt*,(*i*) *Phipps* v. *Anglesea*.(*k*)

Sir *Edward Sugden* and Mr. *Simpkinson*, for the defendant:—His honor's decree is founded in substantial justice, and is not inconsistent with authority. Nothing can be more fair than that the legacy should go to extinguish *pro tanto* the amount of the judgment debt subsisting at the testator's death; nothing more mischievous than that a premium should be held out for laches, and that a legatee, while he evades the payment of his obligations with impunity, should be thereby enabled to swell the amount of his cross demand. If, as might have happened, this judgment had been the only assets left by the testator, the plaintiff's claim would have been continually accumulating, while

(*a*) 4 Ves. 692. 6 Ves. 519. (*b*) 5 B. & A. 204. (*c*) 2 Ves. jun. 272. 581.
(*d*) 2 Ves. jun. 11. (*e*) 2 Ves. jun. 87. 4 Bro. C. C. 257. (*g*) 19 Ves. 196.
(*h*) 16 Ves. 461. (*i*) 5 Ves. 199. (*k*) 5 Vin. Ab. 209. pl. 8.

the fund to discharge it remained stationary. The law of set-off, which was intended to prevent a circuity of actions, rests on a tacit understanding between persons mutually indebted, that a balance shall be struck [*471] between the opposite claims as *they arise, and that the amount of the difference only shall constitute the debt. *Jeffs* v. *Wood* is not to be explained away; it did not stand on the footing of agreement, but was a decision upon the general principle, and has been uniformly followed. *Ranking* v. *Barnard.*(a)

Upon the lapse of time, the principle established in *Cholmondeley* v. *Clinton*(b) is applicable. Acquiescence for upwards of twenty years in the right of a party in possession, or against whom a claim was never brought, is a bar in equity as well as at law. That principle has been repeatedly extended to legacies. The language of Lord Chief Baron Eyre in *Jones* v. *Turberville*(c) is extremely strong to that effect; and is only a recognition of the doctrine which had been laid down and acted upon long before in *Smith* v. *Clay.*(d) There is no evidence whatever of these legacies having been claimed in the long interval between the year 1790, when the testator died, and the year 1821, when the bill was filed by the party representing the legatees; neither is there any evidence that the assets were deficient. At the time of the testator's death, which took place in Jamaica, the legatees were domiciled in that island, were a regular series of administrations has been taken out from 1791 downwards. The legatees must have had little faith in the validity of their own claim, when they assigned their supposed title for the paltry consideration of 25*l.* All the circumstances of the case confirm instead of weakening the presumption arising from the lapse of time.

In calculating the difference between pounds sterling and pounds [*472] in Jamaica currency, the master, by *adopting the nominal instead of the real standard of value, has added to what ought to have been the estimated amount of the legacies at the rate of twenty-two and a half per cent. The permament standard of value as between this country and Jamaica is in the ratio of 14 to 10; in other words, when the exchange is at par, 100*l.* sterling are equivalent to 140*l.* Jamacia currency. But the actual rate of exchange is twenty-two and a half per cent. beyond par in favor of this country; so that every 100*l.* paid in this country are in fact equal to 162*l.* 10*s.* Jamaica currency, and thus the legatees would, upon the master's calculation, gain twenty-two and a half per cent. upon the amount of their legacies. All they are entitled to receive, admitting the validity of the claim, is the value of the legacies in pounds sterling or bills of exchange supposing them to be paid in Jamaica.

August 23.—The Lord Chancellor(e):—By the first of the three ex-

(a) 5 Mad. 32. (b) 2 J. & W. 1. (c) 2 Ves. jun. 11.
(d) Amb. 645. 3 Bro. C. C. 639, n. (e) Lord Brougham.

ceptions brought under review on this appeal, a question was raised touching the right of a legatee, who was also indebted to the testator upon a bond, to retain and set off his legacy against the amount of the bond debt; and, upon a full consideration of the case, I am of opinion that his Honor has decided rightly in allowing that exception.

The next exception related to a subject of more general importance, and as I have not here the good fortune to agree with his Honor in the conclusion to which he was come, it is proper that I should state the facts of the case more fully, and assign the reasons for my difference of opinion.

*The last exception had reference only to the mode, in which the [*473] value of certain legacies given in Jamaica currency were to be estimated: and, as I think that those legacies ought not to be paid, the question as to the value of the currency, or the manner in which that should be ascertained, does not arise.

My observations, therefore, will be confined to the question raised by the second exception: and the facts, upon which the judgment will turn, are shortly these:—The testator died in the year 1790, having bequeathed to John Campbell who survived him, two legacies of 1000*l.* each, the right to which came into discussion under the former exception already adverted to. The present question, however, does not arise upon them, but upon two legacies of 500*l.* given by the will to two other legatees, from whom the plaintiff, who is the personal representative of the same John Campbell, and as such entitled to the two former legacies, purchased them for the sum of 25*l.* each, that is to say, 5 per cent. upon the principal, and at the same time had them regularly assigned to him. And the question now being, whether the plaintiff, by virtue of that assignment, is entitled to those legacies of 500*l.*, I am disposed to hold, so far different from his Honor's judgment, that, in the peculiar circumstances of this case, the plaintiff has failed to make out his title; and to that extent therefore, that the order should be reversed.

Although the testator's death happened in the year 1790, no steps were taken by the legatees, either during the life of John Campbell, or afterwards, to assert their claims under the will: nor did the present plaintiff, at whatever time he acquired his title, resort to any *measures [*474] for the recovery of these legacies prior to the year 1817. In that year a demand, or something like a demand, appears for the first time to have been made on behalf of the legatees, and that was the earliest symptom which the parties exhibited of their being alive to their interests under Mr. Graham's will. The bill was filed in 1821. Here then is a period of at least seven and twenty years, or, reckoning down to the filing of the bill, of more than thirty years, during the whole of which the plaintiff, or those in whose shoes he stands, were perfectly quiescent and inactive with regard to any claims they might intend to assert against the testator's estate.

The question, putting it in a general form, is very important;—Whether

laches of so long a duration, leaving so many years to elapse, so many deaths to occur, and so many changes of circumstances and parties to take place,—whether in such a case the mere lapse of time ought not of itself to operate here, as it certainly would with respect to any demand at law, I will not say as a bar, but as constituting such an acquiescence as justifies a court of equity in presuming payment. The statute of limitations, while it endeavored to apply a remedy to the case of simple contract debts and actions upon tort, to personal and mixed actions as well as to other rights of a real nature, left the case of actions upon specialties, judgments as well as bonds and recognizances, entirely unprovided for; and many complaints in consequence arose, traces of which are to be met with both in the *dicta* and decisions of our early judges. Lord Hale was among the first who countenanced the notion, that, after lapse of time, satisfaction might be presumed even of a speciality; and that doctrine, which subsequently received the [*475] assent of Lord Hardwicke, derived some confirmation from *the statute of William,(*a*) by which twenty years were fixed as the period of limitation for reversing judgments by writ of error. Following the analogy afforded by that statute, or more probably rather the analogy of the period within which personal or mixed actions for the recovery of real rights are limited, the courts have come to adopt the doctrine of Lord Hale by a pretty uniform train of decisions: and they now hold that the lapse of twenty years, if not taken as a positive bar, shall at least be fatal to actions upon bonds, the judge always directing the jury, under such circumstances, to presume in the absence of contrary evidence, that the debt has been satisfied. If interest is proved to have been paid, or if upon demand, any acknowledgment has been made that the debt remains still unsatisfied, there is, of course an end of the presumption. On this subject considerable diversity of opinion has prevailed among the judges at different times; Lord Mansfield going a good deal farther than others have done with respect to the period that must elapse in order to found the presumption; and Mr. Justice Buller having once or twice said that he had known instances where eighteen years had been considered as sufficient for that purpose.

The cases where the subject has been chiefly considered, are a case at law in Burrows;(*b*) and as far as this court is concerned, *Fladong* v. *Winter*(*c*) and *Wynne* v. *Waring*, which is stated in the report of that case. In the two latter, the presumption of payment is admitted to be capable of being rebutted by circumstances,—not only the circumstances already adver- [*476] ted to, of acknowledgment, on a demand made, or a *statement of inability to pay, or an actual payment of interest, which at all events keeps the claim alive, but by the insolvency of the specialty debtor, or his

(*a*) 10 & 11 W. 3, c. 14.
(*b*) 4 Burr. 1962. *Oswald* v. *Legh*, 1 T. R. 270.
(*c*) 19 Ves. 196.

incapacity to discharge his obligations. In *Fladong* v. *Winter*, Lord Eldon decided in favor of the report, (which was against the debt,) unless the exceptant chose to try the question at law. There seems to be some inaccuracy in the note of what fell from his Lordship upon that occasion; for that eminent judge is represented as expressing his surprise that no attention was paid to the material circumstance of the bond having remained in the hands of the obligee; "a circumstance," adds his Lordship, "of great weight." But it is to be observed, that in all but those very rare cases where, upon the principle adopted in *Read* v. *Brookman*,(a) the party is permitted to declare upon a lost instrument, this circumstance, on which Lord Eldon lays so much stress, must of necessity occur. If it were not so, the question never could arise; for it is only by reason of the appearance of the bond,—because the instrument is on the spot and is produced,—that the court presumes the debt to be still subsisting. Counsel, no doubt, endeavor to contend that that circumstance is itself a proof that the debt must remain unpaid; since it would be a singular thing if the obligor, who paid it, should leave so important a document in the hands of the creditor. But the court invariably refuses to listen to any such argument. The language of the judges in such cases is, "The creditor has chosen to lie by for twenty years: true it is, he may have kept quiet possession of the bond; but to supply the defect in the statute of limitations, to show our enmity to stale demands, and our adherence to the principle of *vigilantibus non dormientibus servat lex*, it is our duty to lean strongly in favor of the presumption."

*If that be the clear rule as to specialities at law, notwithstanding [*477] the production of the instrument uncancelled, and simply because twenty years have been suffered to elapse without any steps taken against the debtor, what rational ground can be suggested for excluding the same doctrine from courts of equity in the peculiarly equitable matter of a suit for the payment of a legacy? If the foundation of the rule at law be considered, it should seem that precisely the same principle justifies courts of equity in adopting a similar course. The facilities possessed by a legatee for recovering his legacy from the personal representative, are just as great as those possessed by an obligee for recovering his bond debt from the obligor. Exactly the same presumption arises from his long quiescence; the presumption either that the demand has been satisfied, or that he does not mean to enforce it; and there is this material difference between the cases,—the one is a volunteer, the other a creditor for valuable consideration: the obligee is a creditor for high value, the evidence of consideration, the deed and seal being of so high a nature in the law, that no proof can be given of the want of consideration, and except as between creditors, the party is estopped from alleging that no consideration passed. In point of fact, however, in almost every bond transaction a money consideration has been given.

(a) 3 T. R. 151.

I cannot see, therefore, why the same doctrine should not be applicable to equitable as to legal jurisdiction: but as nothing can be more dangerous than to proceed upon reasons of analogy, even where they only follow the course pursued by courts of equity in adopting the practice of the common law, I should not feel myself justified in that inconsiderable, and, as it seems, reasonable and beneficial step, if I did not find, that the principles upon
[*478] which I am disposed to make it, had *been recognized by the decisions of this court and by the *dicta* of my predecessors in office. The case to which I would particularly refer in that view is *Hercy* v. *Dinwoody*.(a) The doctrine is there laid down in the way in which it is safest to propound it, that equity has not yet established, nor the practice of this court adopted any rule, which makes twenty, or twenty-five, or even thirty years a bar, any more than the courts of law have, with respect to specialty debts, but that each case must depend on its own circumstances. Courts of law, indeed, have gone somewhat farther; for they consider it as the next thing to a necessary presumption; they throw the proof on the other side, on him that would rebut the presumption. Their language is, "If no contrary circumstance appears, twenty years shall be an absolute bar." In *Hercy* v. *Dinwoody* Lord Alvanley said, that no certain rule had been worked out by the court, but that each case was to depend upon its own circumstances, with a strong leaning, however, to take into consideration the lapse of time, when no contrary circumstance rebutted it.

These principles are sanctioned by the high authority of Lord Camden in the case of *Smith* v. *Clay*,(b) of which there is an imperfect account in Ambler, but which is well reported, from the notes of the learned judge himself, in the third volume of Mr. Brown's Chancery Cases, in a note to the case of *Lord Deloraine* v. *Browne*. It is true that *Smith* v. *Clay* was at first a good deal cavilled at and objected to. The way, however, in which those objections,—objections evidently taken *per incuriam*,—have yielded to
[*479] further inquiry and reflection is extremely *remarkable and instructive, and greatly adds to its weight as an authority. In *Pickering* v. *Lord Stamford*,(c) a case undoubtedly of great value, though rather perhaps for the argument, than for the particular point which it decided, Lord Alvanvey, the Master of the Rolls, in the first breaking of the case, expresses an opinion extremely adverse to *Smith* v. *Clay*. When the counsel for the defendant, referring to *Smith* v. *Clay*, cited the language of Lord Camden, that "a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time," the Master of the Rolls observed, "That was a bill of review I believe; it is clear there was a mistake." And on the counsel proceeding, his Lordship again

(a) 4 Bro. C. C. 257. 2 Ves. jun. 87.
(b) 3 B. C. C. 639, n. Amb. 645.
(c) 2 Ves. jun. 272.

carps at it, saying, "They were not bound to know the decree was wrong. They knew there was such a will, and they knew there was a decree. I think there ought to be a bill of review at any distance on error apparent." This was upon the first argument of the case. When he next comes to consider the question, however, after an interval of nine or ten days had given him time to reconsider the matter, and to reflect a little upon the authority of *Smith* v. *Clay*, his Lordship takes a very different view. His words are, "The court has adopted rules upon that, as far as they could, by analogy to the rules of law. Twenty years' possession is a bar to the equity of redemption of a mortgagor. There certainly may be cases in which, after a length of time, though it may not be pleadable, this court would hold a bill to come too late. If a party, having knowledge of his rights, will sit still, and, without asserting *them, permit persons to act as if they did not exist, [*480] to acquire interests, and consider themselves as owners of the property to which the other will not assert his claim, there is no reason that I know of why every presumption should not arise, as in the case of a bond." His Lordship, upon the former occasion, had said, there ought to be a bill of review at any distance for error apparent. That is not the same doctrine which his Lordship lays down here; for he says, "There is no reason that I know of why every presumption should not arise, as in the case of a bond. *Jones* v. *Turberville* is a very clear case, in which the lords' commissioners held a legacy barred after forty years, and would not entertain the bill. Now if this," he proceeds, "had been the case of a legacy, I should have been of opinion that there was a bar in the presumption of satisfaction." The case of *Pickering* v. *Stamford*, then under Lord Alvanley's consideration, was very much mixed up and complicated; the question which it involved mainly relating to a charity; but he states, that if it had been a simple naked case of a legacy, he should have been of opinion there was a bar in the presumption of satisfaction. Coming afterwards to *Smith* v. *Clay*, which he appears now to be much more disposed to follow, because he was better acquainted with it, he says, "*Smith* v. *Clay* will be found much more fully reported in Brown, in the note to *Lord Deloraine* v. *Browne*, than in Ambler,"—a passage from which it seems highly probable that he had not before examined the excellent report in Brown:—he adds, "It is well worth reading; it not only decides the point as to not opening a bill of review after twenty years, even for error apparent on the record, but there is a great deal of sound doctrine laid down with regard to parties neglecting to prosecute their rights, in a manner which very much distinguishes the decrees of that noble lord."

*I consider his Lordship's opinion in favor of that case as a grave [*481] authority: and what renders his assent to it the more valuable is, that it was yielded slowly and with reluctance, and as the result only of further consideration, a result most creditable to his candor. I am also justified in assuming the well considered assent which he gave, to go a great deal far-

ther than the particular point in the cause, and that though the question was only upon a bill of review, he approved of the general doctrine contained in the judgment.

The subsequent part of Lord Alvanley's judgment, which I admit certainly to be the law, is also well deserving of attention. "At the same time, I know no rule," he says, "that has established that mere length of time will bar. If I did, I would dismiss the bill. Therefore, that being the case, I am to say whether under such circumstances a bar can be presumed." And upon the circumstances of that case, holding as he did in *Hercy* v. *Dinwoody*, that the particular circumstances of each case must be decide, he did not dismiss that particular bill, although he stated that if it had been the case of a legacy he certainly would have dismissed it. The time there was five and thirty years. The cause came on again some time afterwards,(*a*) and there also he refers to the doctrine in *Smith* v. *Clay* and *Hercy* v. *Dinwoody*, and makes this observation, "the bill certainly requires very extraordinary circumstances to sustain it at so late a period, and the first question is, whether at this distance of time it is too late to make the claim." After expressing his regret that the rule was not here as in courts of law, nearly amounting to a bar, he continues, "But when I admitted that, as I did fully in *Hercy* v. *Dinwoody*, and in [*482] this cause, it does not follow that the bill may not *be dismissed, though it cannot be pleaded to. The question in all these cases is, whether there are motives of public policy or private inconvenience to induce the court to say, under all the circumstances, the suit ought not to be entertained." And the rest of his reasoning proceeds upon the same grounds, leaning strongly towards a presumption in favor of payment or satisfaction in cases of long acquiescence.

This brings me to the second observation to which the case of *Smith* v. *Clay* is liable namely, that it was the case of a bill of review, and not an original demand of a debt or legacy. That is no doubt true: but it is equally true that the same principles upon which *Smith* v. *Clay* was decided are more strictly applicable to the cases of a common debt, and of a claim under a will. "Nothing" says Lord Camden, "can call forth this court into activity but conscience, good faith, and reasonable diligence: where these are wanting the court is passive, and does nothing." And the doctrine laid down by his Lordship is, that it is the rule of this court always to discourage stale demands, and to throw upon the party coming after long acquiescence, the burthen of showing why he lay by so long.

A party buying a legacy of 500*l.* for 25*l.* after seven and twenty years has elapsed, and then allowing four years more to pass before filing his bill, making altogether a laches of more than thirty years, in my apprehension has himself to blame, if he finds when he comes into this court, that his remedy is gone. Upon the principle of some of these cases, therefore, and upon the

(*a*) 2 Ves jun. 581

authority of others, admitting nevertheless that no one has gone so far as to say that mere lapse of time can be pleaded as a bar, and stating also that I can find no case in which the precise period of seven and twenty years has been *held to be sufficient to shut the doors of a court of [*483] equity against such a demand, as too stale to be enforced—upon the principles and the reasoning in some of these cases, and the actual decisions in others, I am disposed to hold that the plaintiff has come too late, and that the doors of this court ought not now to be thrown open to him, inasmuch as, to use Lord Camden's expression, the court cannot be called into activity to aid a demand, be it for a legacy or for a debt, unless with good faith and with good conscience a reasonable degree of diligence shall have been used. To say that this is laying down a new doctrine, because the precise period of seven and twenty years is not found in other cases, is evidently a narrow and superficial view of the subject. As the question, however, is one of great importance in itself, and as, where the courts below have differed, the superintending authority of the court of the last resort is extremely desirable (although I entertained no doubt as to the soundness of the judgment I have given,) it would perhaps be on the whole more satisfactory if the case were carried for final adjudication to the House of Lords.[1]

The plaintiff has since presented a petition of appeal to the house of lords.

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*STRATTON *v.* DAVIDSON. [*484]

1830; April 20, 21.

In a suit for the specific performance of a contract for the sale of an estate in the West Indies against a purchaser who resided there, and had got into possession without paying the purchase money, and to which the consignees of the estate were also defendants, an application for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a subpœna.

THE *Solicitor General* and Mr. *Tinney* moved, that the defendants, who were the consignees of the produce of a West India estate, might be re-

[1] A lapse of thirty years affords a presumption that a legacy had been paid; but that presumption may be repelled by circumstances. *Arden* v. *Arden*, 1 Johns. Ch. Rep. 313. But as the statute law of N. Y. (Sess. 36, Ch. 75, 1 N. R. L. 311, § 19, 20,) authorized an action at law for a legacy, Kent Ch. afterwards inclined to the opinion that the analogy of the statute of limitations would apply to a suit in equity, for a legacy. *Kane* v. *Bloodgood*, 7 Johns, Ch. Rep. 126. The affirmative also seems to be assumed by Walworth Ch. in *Wood* v. *The Executors of Riker*, 1 Paige, 616. And see *Giles* v. *Baremore*, 5 Johns, Ch. Rep. 550. *Gist* v. *Heirs of Cattell*, 2 Dessau, 53. *Irby* v. *McCrae*, 4 Dessau. 222.

strained from paying over the proceeds to the other defendant Symonds, who was out of the jurisdiction, and that a receiver might be appointed.

According to the case made by the bill, the plaintiffs were the vendors of the estate in question. One of the defendants, Symonds, was the purchaser who had been allowed to take possession of the property under a verbal agreement, and had continued to retain it ever since the year 1814, without completing his contract, and without paying either rent or interest on his purchase money. The other defendants Davidson & Co. were merchants in London, to whom the produce of the estate was consigned by the purchaser. Symonds had never been served with process; but in the year 1829, during a short stay in this country, which he visited on his way to Scotland, where his relations resided, a negotiation was carried on with him through the medium of his solicitor, for the purpose of inducing him to perform his part of the agreement. That negotiation, however, eventually failed and came to nothing; and while he was either in Scotland, or on his voyage back to the West Indies, the present bill was filed, praying to have the contract specifically executed.

Mr. *Pemberton*, for the consignees, opposed the motion.

[*485] *The *Solicitor General*, in reply.

The Lord Chancellor:—This suit is instituted to enforce the specific performance of a contract relating to the purchase of a property in St. Vincent;[1] a contract which was entered into by a person who was then a resident in that island. The purchaser, Mr. Symonds, many years afterwards, but before a conveyance was made, came over to this country for some particular objects of his own. It does not distinctly appear how long he remained in England, but it was a very short time only; and during his stay negotiations were set on foot, which were ultimately broken off, respecting the completion of the transaction for the purchase. Mr. Symonds afterwards proceeded to Greenock, and there embarked for St. Vincent, where he now resides. There is nothing to show that he left England for the purpose of avoiding service of process. This is an application for the appointment of a receiver of the produce of the estate; but the defendant, whom this motion principally seeks to affect, has had no notice, and has never been served with process; and under such circumstances it would be the extreme of injustice to grant the application.(*a*)

Motion refused with costs.[2]

(*a*) See *Tanfield* v. *Irvine*, *Coward* v. *Chadwick*, 2 Russ. 149, 150, n. where several other cases on the subject were referred to.

[1] That the court will frequently exercise jurisdiction, in relation to land abroad, where the party to be affected is within its control, see *Massie* v. *Watts*, 6 Cranch, 148. *Ward* v. *Arredondo*, Hopk. 213. *Le Roy* v. *Rogers*, 3 Paige, 236. *Hawley* v. *James*, 7 Paige, 218. *Sutphen* v. *Fowler*, 9 Paige, 280. *Briggs* v. *French*, 1 Sumn. 504. *Congdon* v. *Lee*, 3 Edw. Ch. Rep. 307. A court of equity in England will entertain a bill to settle the boundaries of real estates in Jamaica. *Tulloch* v. *Hartley*, 1 Yo. & Coll. C. C. 114.

[2] A receiver may be appointed without notice to the opposite party, where irreparable injury

*Barnes *v.* Wilson. Tarleton *v.* Dyer. [*486]

1830; April 23, 24.

A *caveat* tendered at the proper office after a decree has been delivered to the secretary for enrolment, and forwarded to the Lord Chancellor in order to be signed, comes too late to prevent the effect of enrolment, although in point of fact the signature was not adhibited till after the *caveat* was rendered.

The enrolment of a decree will not be vacated merely on the ground of despatch used by the party enrolling, or of surprise upon the opposite party, where no fraud or deception has been practised.

A party is not bound to communicate to his adversary his intention to enrol the decree, because the latter informs him of his intention to appeal against it.

Mr. Horne, Mr. *Tinney*, and Mr. *Spence* moved that the enrolment of two orders allowing the demurrers in these causes might be vacated. The orders in question were pronounced by the Vice-Chancellor on the morning of Thursday, the 26th of November, 1829, and on the following day they were drawn up and given by the registrar to the defendant's solicitor. The necessary documents for effecting the enrolment having been procured from one of the six clerks, they were, about noon on the following Monday, delivered to the bag-bearer, and by him put into the hands of the secretary of decrees, for the purpose of being submitted to the Lord Chancellor for signature. The secretary affixed his seal to the papers, and they were then despatched between three and four o'clock on that day, by a special messenger, to Brighton, where his lordship was residing, and where they were signed at a late hour the same night. In the course of that evening, but some time after the departure of the messenger, a *caveat* on behalf of the plaintiff, was brought to the office, and the person tendering it was then informed that it came too late, as the decrees had been already forwarded to the Lord Chancellor.

The application was supported by an affidavit of Mr. Taylor, the plaintiff's town agent, stating in detail *a variety of circumstances by [*487] which, after the orders were pronounced, he had been thrown off his guard, and led to neglect the precaution of entering a *caveat*. On the other side was produced a counter affidavit made by Mr. Perkins, the agent of the defendant, setting forth the particulars of certain conversations between himself and the agent for the plaintiff, from which it appeared, that, both before and after the demurrers were argued, Mr. Perkins had maintained a cautious reserve in speaking of what course he should pursue, and that he had done no positive act, from which it was necessarily to be inferred, that he intended to waive any advantage afforded by the rules of strict practice. The general effect of these affidavits is sufficiently stated in the judgment.

For the motion it was argued that, according to strict practice, the *caveat*

would be sustained by delay, or the defendant is out of the jurisdiction of the court, so that he cannot be served with a subpœna. *The People* v. *Norton*, 1 Paige, 17. In *Gibbins* v. *Mainwaring*, 9 Sim. 77, a receiver was granted against a defendant who was out of the jurisdiction; but none of the facts of the case are stated in the report. And see 2 Russ. 152, n. 1. *Browne* v. *Blount*, 2 Russ. & M. 83

was entered in time, and that consequently the enrolment was void. The decrees must have been signed after the *caveat* was lodged; for it was left at the office within four hours after the decrees were delivered to the messenger: it was necessary that these should be forwarded to Brighton for the Lord Chancellor's signature; and, at the moment when that signature was adhibited, the *caveat* must have been already filed, a fact of which if his Lordship had been aware, he would have refused to sign them.

Granting, however, that in strictness the *caveat* was a few hours too late, still the conduct of the defendant's agent exhibited a specimen of sharp practice which courts of equity ought not to countenance, and which if tolerated would be attended with ruinous consequences to this plaintiff, and would encourage similar attempts in other cases. The result would be by a trick to [*488] get rid, upon demurrer, of these suits, and virtually to *deprive the plaintiff of his right of appeal; for, from the circumstances of the parties, it would be madness to incur the expense of carrying the case to the house of lords.

Independently of deceit or intentional misrepresentation, it was impossible not to see upon the affidavits that the natural effect of the conversations there detailed was to throw the plaintiff's solicitor entirely off his guard. If not a case of fraud, therefore, which would of itself unquestionably furnish a sufficient ground for vacating the enrolment, it was certainly one of surprise, from the consequences of which the court was always disposed to relieve, in order to further the ends of justice, especially where the slip was of the most trifling and doubtful kind. Such relief was given by Lord Eldon in *Robinson* v. *Newdick*,(*a*) and in *Stevens* v. *Guppy*.(*b*) In a case in Vesey(*c*) Lord Hardwicke went still farther, for his Lordship said, "I never knew greater despatch than in the present case; therefore though it is strictly regular, yet being so *quick*, it is within the reason of the common law courts setting aside judgments every day as on surprise; although they are strictly regular. So may this court, especially when it partly arises on the defendant's mistake." On another occasion his Lordship observed, "These precedents prove it to be discretionary in the court, I do not mean arbitrarily, to exercise this power if they think fit."

A similar doctrine is laid down broadly in a case in Vernon.(*d*) As [*489] it was now unusual to enrol decrees, the *caveat* had come to be *considered as a mere form which occasions unnecessary expense, and might as well be dispensed with.

The *Solicitor General* and Mr. *Richards*, contra:—This is a case entitled to no indulgence. It seeks to revive a claim after the parties have lain on their oars for nearly twenty years; and it was only by something very like a trick, that the plaintiff was enabled to keep his bill in court, after it had been

(*a*) 3 Mer. 13. (*b*) 1 T. & R. 178. (*c*) Anon. 1 Ves. sen. 326.

(*d*) Anon. 1 Vern. 131. Also *Kemp* v. *Squire*, 1 Ves. sen. 205, and the cases there cited. S. C. 1 Dick. 131. *Price* v. *Solly*, 1 Dick. 21. *Pickett* v. *Loggon*, 5 Ves. 702. S. C. 14 Ves. 231. 3 Sw. 534. n.

supposed to be finally dismissed.(*a*) The Vice-Chancellor's judgment on the demurrers proceeded entirely on the merits, so that, if the enrolment was regular, there is no pretence for applying to get rid of these decrees by motion. *Charman* v. *Charman*.(*b*) No doubt the enrolment could not be allowed to stand, if there had been bad faith on the part of the defendant; but there was nothing of the kind. In *Stevens* v. *Guppy* there was wilful deception. The nature of the case in Vesey is not stated, but it appears that the party taking the *caveat* went in time, but carried it by mistake to the wrong office. The rule is, that a certain advantage, well known to the profession, is obtained by enrolment; every party must be presumed to be aware of that advantage; and if he suspects that his adversary means to have recourse to it, he may for 5*s*., and without any reason assigned, stay the enrolment for a month by entering a *caveat* at the office.

It is not true that the *caveat* was lodged in sufficient time. The rule is universal, that where a party has performed all that is incumbent upon him with a view to the perfecting of an act, (and that was done in this instance by leaving the orders with the proper officer, who makes a note of the time when they are delivered,) the act is considered to be then [*490] complete. If the Lord Chancellor signs and returns the instrument, the signature operates by relation from the time when the necessary documents were left or tendered. If his Lordship does not sign it, of course the instrument remains incomplete. An opposite rule would be in the highest degree inconvenient; since it would involve the necessity of a minute and often an impracticable investigation, for the purpose of ascertaining the precise moment when the signature was affixed. To avoid that inconvenience, then enrolment of annuity deeds and of deeds of bargain and sale has always been held to be effectual from the time when they are left with the registrar; and that anology must be followed here.

There is no usage or understanding in the profession, in conformity with which a party is bound, even in courtesy, to apprize the other side that he is proceeding to get a decree enrolled; nor can the officiousness of his adversary in giving him notice of an intended appeal, impose on him any new obligation to be equally explicit, in communicating the measures which are in contemplation, for the purpose of preventing that appeal.

Upon the affidavits it is manifest there was no fraud or misrepresentation. The plaintiff's solicitor was his own dupe. He never dreamed of there being any intention to enrol the decree, and was probably not aware of the consequences of enrolment. Was it for the defendants' agent gratuitously to rouse his adversary's suspicions and put him on his guard? Neither was there any extraordinary despatch used in drawing up the decree; and no *extra* fees were paid for expedition.

Mr. *Horne*, in reply, observed that the analogy did not hold between

(*a*) Supra, p. 1. (*b*) 16 Ves. 115.

[*491] the case of decrees and of deeds *requiring enrolment; for that when deeds were enrolled, there was but one party concerned; it was entirely an *ex parte* proceeding, and no other individual had a right to interfere.

THE LORD CHANCELLOR stated, that having made inquiry, he had ascertained, that, in point of fact, the documents had been laid before him for signature about eleven o'clock on the Monday night, which must have been considerably later than the time when the *caveat* was tendered at the office.

April 24.—THE LORD CHANCELLOR:—The question in this case is, whether a *caveat* was entered at the office in time to prevent the effect of the enrolment of the Vice-Chancellor's decrees. My impression at the close of the argument was, that the construction contended for on behalf of the plaintiffs was one that would be attended with great inconvenience. According to that construction, it would become necessary to watch the precise time when the decree is signed; for, in order to determine the priority, reference must be had to the moment when the signature is affixed. From the anonymous case before Lord Hardwicke, however, I rather collected that the delivery of the documents to the messenger, for the purpose of being carried to the Lord Chancellor for enrolment, was the time from which the act of enrolment was to be deemed complete. On this subject I have consulted the six clerks, from whom I have received a certificate that, in their opinion, the enrolment was completed by the delivery of the documents to the messenger; and that here the *caveat* was not in time. That certificate corresponds with
[*492] the opinion which I *formerly expressed as to what would be the convenient course, and I am disposed to conform to it.

The question then resolves itself into the case made upon the affidavits. By the rules of the court, a party has a right to get his decree enrolled for the purpose of preventing an appeal; and he has a right to use as much expedition as he chooses in so doing; and the other party has an opportunity of preventing such enrolment, for a limited time, by previously entering a *caveat*. If he neglects that opportunity, he is precluded from appealing, unless the party enrolling his decree, has, by some act of his, prevented his adversary from entering the *caveat* in due time. And one question here is, whether any thing has been done by Mr. Perkins to mislead Mr. Taylor. It appears that immediately previous to the judgment, Mr. Taylor said in the presence of Mr. Perkins, that if the decree of the Vice-Chancellor was against his (Mr. Taylor's clients, they intended to appeal; and Mr. Perkins likewise said, that if the decree was unfavorable to his clients, he should also appeal, and that Mr. Taylor then observed there might be some difficulty as to whether there should be two separate appeals, or only one. But it does not appear that previously to the hearing of the demurrers,

any understanding or arrangement was come to between the parties; or that what passed on that occasion amounted to any thing more than a mere assertion or statement on both sides. A bare communication of an intention to appeal, cannot be considered sufficient to prevent the other party from proceeding to get his decree enrolled. Nor do I think that a solicitor is bound to communicate that he is proceeding to enrol the decree, so as to deprive the opposite party of an opportunity of entering a *caveat*. There is some slight conflict of evidence as to the circumstances that took *place after the judgment was given; but what passed, whatever it [*493] may have been, does not seem to have been very important; and Mr. Perkins denies that he then had any conversation on the subject. On the Monday following, which was the 30th of November, on the parties again happening to meet, Mr. Taylor mentioned to Mr. Perkins his intention of appealing, and stated that he was then preparing the papers with that view. It was not said by Mr. Perkins that he was proceeding to enrol the decree; nor do I think that he was bound to make any such statement. He was perfectly silent upon the subject, and having done no act to mislead the other party, it is not like the case of *Stevens* v. *Guppy*, where Lord Eldon rested his decision expressly on the ground that the party enrolling had said that, which might lead the other party to believe, that the decree would not be enrolled.

The plaintiff's solicitor must, therefore, take the consequences of his omission.[1]

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*De Geneve v. Hannam. [*494]

1830; April 23.

An order to amend, obtained in violation of the 13th of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill.

If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made.

On the 2d of November, 1829, the answer of the defendant Joseph Arden was referred on exceptions for insufficiency, and on the 14th of the same month, the master reported that his answer was sufficient. On the 8th of February, 1830, the defendant Arden gave notice for the 12th (the last day of Hilary term,) of a motion before the Vice-Chancellor to dismiss the plaintiff's bill for want of prosecution, no step having been taken in the cause

[1] Vide *Parker* v. *Downing*, 1 Myl. & K. 634. *Bulguy* v. *Chorley*, id. 640. *Wardle* v. *Carter*, 1 Myl. & Cr. 283. *Dearman* v. *Wych*, 4 Myl. & Cr. 550. *Jackson* v. *Welsh*, 1 Dru. & Walsh, 255.

since the master's report of sufficiency was made. On the 9th of February, the plaintiff obtained, by petition of course at the rolls, an order to amend his bill within three weeks from that date, and on the 12th of that month, the dismissal of the bill was moved before the Vice-Chancellor, according to the notice. Mr. Roupell, however, who appeared on that occasion as counsel for the plaintiff, suggesting that the plaintiff had been unable to get in the answers of the other defendants, his honor allowed the matter to stand over till the next seal, for the purpose of producing an affidavit of that fact. On 20th of February, which was the first seal after Hilary term, the motion was accordingly renewed, and no affidavit being then produced, the order of dismissal was pronounced.

A motion was now made to discharge the Vice-Chancellor's order.

Mr. *Horne* and Mr. *Roupell* for the motion, contended that the order was erroneous on two grounds; First, because the notice of motion was given for a day on which, according to the 16th of the new orders, the motion [*495] could not be regularly made, namely, the 12th of *February, whereas the earliest day on which the dismissal could have been moved was the 20th of that month, which was the first seal after Hilary term; and although, from a mere accident, the motion had stood over till the 20th, that circumstance could not cure the original defect: Secondly, because no order of dismissal could be made while an order obtained, whether regularly or not by petition at the rolls, and giving liberty to amend, was subsisting and in force.

Mr. *Parker*, contra, admitted that if the former objection had been urged before his honor at the time, it might have been fatal; but he insisted that the matter having, as an indulgence to the plaintiff, and on a suggestion which turned out to be unfounded, been permitted to stand over to a day when the motion was perfectly regular, and the plaintiff having then appeared and not taken the objection, although he resisted the motion upon other grounds, must be held to have waived any irregularity in the notice. At any rate it was now too late to bring it forward with success upon appeal. The other circumstance on which the plaintiff relied, that an order to amend was subsisting at the time when the dismissal was moved, had been distinctly insisted upon before the Vice-Chancellor, and overruled, his honor being of opinion, that an order made in the irregular manner in which that was admitted to have been obtained, was to be treated as a mere nullity, and could not therefore affect the defendant's right to have the plaintiff's bill dismissed for want of prosecution.

The Lord Chancellor said, that as to the latter objection, the order having been improperly obtained, in defiance of the 13th of the new orders it was in his opinion unnecessary to move to have it rescinded. But upon the other point he held, that as the notice was originally bad, the [*496] order made in pursuance of it must *be considered to be bad likewise. As the plaintiff, however, by not taking the objection in the

first instance, had rendered the present motion necessary, though his Lordship discharged the order of dismissal, he decided that the plaintiff should pay the costs of the application to discharge it.

In the Matter of Joseph and Webster.

1830; April 23.

If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion.

Jurisdiction of the court of chancery in awards, under the 9 & 10 W. 3, c. 15.

The *Solicitor General* and Mr. *Stuart* moved that an order of his honor the Vice-Chancellor might be rescinded, and that a writ of attachment might issue against Webster for non-performance of an award.

It appeared from the affidavits that a sum of money had been claimed by Joseph as due to him from Webster, in his character of executor to the debtor, and that there being no cause then depending between them, Webster joined with him in a general submission of all matters in dispute to an arbitrator, which submission was regularly made an order of the court of chancery, under the provisions of the 9 & 10 W. 3, c. 15. The award pronounced in pursuance of that reference directed, that a sum of 19*l.* 19*s.* 4*d.* should be "paid out of the assets which might be in Webster's hands, or which might be coming to him." The costs of the reference, which he was also directed by the award to pay, were taxed by the master at 23*l.* On the 25th of July, 1829, Joseph moved that Webster might be ordered to pay the sum awarded, together with the costs, on the ground that a general submission was an admission of assets. The Vice-Chancellor, however, upon the reading of an affidavit by Webster, stating that he had no assets in hand, and that he was then considerably out of pocket on account of his executorship; and, in consideration of the peculiar language of the award, refused the [*497] application with costs.

The motion having been renewed before the Lord Chancellor, a farther affidavit was filed on behalf of Joseph, stating facts and circumstances from which it was to be inferred that subsequently to the discussion before his honor, Webster had received assets, and had, then, and now, upwards of 100*l.* of the testator's property in his hands.

Mr. *Spence*, who appeared for Webster, opposed the production of this affidavit, on the ground that it was not before the Vice-Chancellor, and that in fact it was now used to support quite a new case; but *Const* v. *Barr*(*a*) being cited as an authority in favor of the admissibility of the affidavit, the Lord Chancellor recognized and approved of the doctrine there laid down, and

(*a*) 2 Russ. 161.

since the master's report of sufficiency was made. On the 9th of February, the plaintiff obtained, by petition of course at the rolls, an order to amend his bill within three weeks from that date, and on the 12th of that month, the dismissal of the bill was moved before the Vice-Chancellor, according to the notice. Mr. Roupell, however, who appeared on that occasion as counsel for the plaintiff, suggesting that the plaintiff had been unable to get in the answers of the other defendants, his honor allowed the matter to stand over till the next seal, for the purpose of producing an affidavit of that fact. On 20th of February, which was the first seal after Hilary term, the motion was accordingly renewed, and no affidavit being then produced, the order of dismissal was pronounced.

A motion was now made to discharge the Vice-Chancellor's order.

Mr. *Horne* and Mr. *Roupell* for the motion, contended that the order was erroneous on two grounds; First, because the notice of motion was given for a day on which, according to the 16th of the new orders, the motion [*495] could not be regularly made, namely, the 12th of *February, whereas the earliest day on which the dismissal could have been moved was the 20th of that month, which was the first seal after Hilary term; and although, from a mere accident, the motion had stood over till the 20th, that circumstance could not cure the original defect: Secondly, because no order of dismissal could be made while an order obtained, whether regularly or not by petition at the rolls, and giving liberty to amend, was subsisting and in force.

Mr. *Parker*, contra, admitted that if the former objection had been urged before his honor at the time, it might have been fatal; but he insisted that the matter having, as an indulgence to the plaintiff, and on a suggestion which turned out to be unfounded, been permitted to stand over to a day when the motion was perfectly regular, and the plaintiff having then appeared and not taken the objection, although he resisted the motion upon other grounds, must be held to have waived any irregularity in the notice. At any rate it was now too late to bring it forward with success upon appeal. The other circumstance on which the plaintiff relied, that an order to amend was subsisting at the time when the dismissal was moved, had been distinctly insisted upon before the Vice-Chancellor, and overruled, his honor being of opinion, that an order made in the irregular manner in which that was admitted to have been obtained, was to be treated as a mere nullity, and could not therefore affect the defendant's right to have the plaintiff's bill dismissed for want of prosecution.

The Lord Chancellor said, that as to the latter objection, the order having been improperly obtained, in defiance of the 13th of the new orders, it was in his opinion unnecessary to move to have it rescinded. But upon the other point he held, that as the notice was originally bad, the [*496] order made in pursuance of it must *be considered to be bad likewise. As the plaintiff, however, by not taking the objection in the

first instance, had rendered the present motion necessary, though his Lordship discharged the order of dismissal, he decided that the plaintiff should pay the costs of the application to discharge it.

In the Matter of Joseph and Webster.

1830; April 23.

If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion.

Jurisdiction of the court of chancery in awards, under the 9 & 10 W. 3, c. 15.

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It appeared from the affidavits that a sum of money had been claimed by Joseph as due to him from Webster, in his character of executor to the debtor, and that there being no cause then depending between them, Webster joined with him in a general submission of all matters in dispute to an arbitrator, which submission was regularly made an order of the court of chancery, under the provisions of the 9 & 10 W. 3, c. 15. The award pronounced in pursuance of that reference directed, that a sum of 19*l.* 19*s.* 4*d.* should be "paid out of the assets which might be in Webster's hands, or which might be coming to him." The costs of the reference, which he was also directed by the award to pay, were taxed by the master at 23*l.* On the 25th of July, 1829, Joseph moved that Webster might be ordered to pay the sum awarded, together with the costs, on the ground that a general submission was an admission of assets. The Vice-Chancellor, however, upon the reading of an affidavit by Webster, stating that he had no assets in hand, and that he was then considerably out of pocket on account of his executorship; and, in consideration *of the peculiar language of the award, refused the [*497] application with costs.

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(*a*) 2 Russ. 161.

directed the affidavit to be read: and upon the effect of that evidence, he decided, that Webster was bound to pay the money, in pursuance of the award.

On the question of costs, it was then contended that a general submission to arbitration was, as between the parties, an admission of assets both at law and in equity. *Robson* v. ———.(*a*) That must always be a necessary implication; otherwise *cui bono* the expense and trouble of the reference? Here there was a reference; that is to say, an admission of assets, which no denial of the party could be permitted to countervail.

On the other side reliance was placed on the very special wording of the award, by which the debt was directed to be paid out of assets when they should come into Webster's hands, a point which had seemed so clear to his honor, that when he refused the application, he allowed Webster his costs.

[*498] *The Lord Chancellor:—The question now stands before me precisely as if this were an original motion; and if a party succeeds in an original motion, the court is frequently in the habit of giving him costs. According to the case made before the Vice-Chancellor, his decision was perfectly correct; for, upon the evidence laid before his honor, there were then no assets in the hands of Webster, and the application was to enforce an award which was to pay money out of assets, if there were any, and if not, out of future assets. The Vice-Chancellor thought there was nothing to satisfy him that there were any assets; and he therefore dismissed the motion. On the evidence before me, however, it appears that there are assets; but as the case is now brought forward on additional facts and evidence, I must consider this to be substantially a new motion,[1] and the costs of the application ought, therefore, to be given to the successful party.(*a*)

(*a*) 2 Rose, 50.

(*b*) Applications of this kind, to enforce and award where no cause is depending, though of every day's occurrence in courts of law, are extremely unusual in the court of chancery. So rare indeed have they been, that the officers of that court were not aware of any precedent, and were disposed to doubt the jurisdiction. Mr. Tidd (2 Pract. 821, 9th edit.) has expressed a similar doubt, on the ground that the statute of 10 W. 3, c. 15, is confined to courts of record. The language of the second section, however, as observed by Maddock, (2 Ch. Pr. 712,) is altogether unintelligible if the act be held not to extend to submissions which have been made orders of a court of equity: and in *Godfrey* v. *Bercher*, (3 Vin. Ab. 139,) *Lonsdale* v. *Littledale*, (2 Ves. jun. 451,) *Nichols* v. *Chalice*, (14 Ves. 265,) and other cases where the effect of the statute came incidentally into discussion, the jurisdiction has never been questioned; though, as these have been chiefly upon submissions made in causes, to which, according to the better opinion, the statute does not apply, (1 Mad. Ch. Pr. 296, ii. 713,) it was not necessary formally to consider the point. But the submissions in *Webster* v. *Bishop*, (Pr. Ch. 223, 2 Vern. 444,) and *Spettigue* v. *Carpenter*, (3 P. W. 361,) seem to have been made orders of the court of chancery under the statute; and in the principal case the jurisdiction was not disputed.

[1] A motion cannot be repeated except on some new ground; and affidavits, which merely present additional or cumulative evidence on the points before presented, are not to be considered as showing new grounds for the motion. *Hoffman* v. *Livingston*, 1 Johns. Ch. Rep. 201. *Dunham* v. *Warren*, 2 Paige, 24. *Ray* v. *Connor*, 3 Edw. Ch. Rep. 478.

*IN THE MATTER OF THE ESTATE OF MARY ENGLAND, DECEASED. [*499]

ROLLS.—1830; April 28.

Where a father has deserted his children, and is not of ability to maintain them, the court will make an order, referring it to the master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of property to which they are absolutely entitled under a will; and upon the master's report, that it is for their benefit, and with the consent of the executors of that will, the court will order the sum to be raised accordingly.

THIS was the petition of Nathaniel Knott, the sole executor of the will of Mary England, who thereby gave her residuary estate to the three children of John Knott, the brother of the petitioner.

John Knott had separated from his wife Helena Knott, who was the mother of the three children, in the year 1818, and was resident in England in very reduced circumstances, and not of ability to maintain his children. The three children, upon the separation, were left with the mother, who resided in the East Indies, and, in the year 1820, two of the three children were sent to the petitioner to be educated in England, and had ever since remained with him at an expense for their maintenance and education of 500*l.*

The testatrix, Mary England, died in July, 1829; and the petition stated that all the debts of the testatrix had been paid, and that her residuary estate to a considerable amount was invested in the public funds.

The petition, after setting forth these circumstances, further stated that the mother of the children was able and willing to maintain her children, if they returned to her in India, and that she and the two children were desirous that they should so return; but that the expense of the voyage to India would be 300*l.* which the mother had no means of defraying. The prayer was, that the petitioner might be at liberty to sell part of the residuary estate of Mary England, to which the three children were absolutely entitled, for the purpose of *raising the two sums of 500*l.* and 300*l.* to be [*500] applied in payment of the past maintenance of the two children who were still infants, and in payment of their expenses to India.

In support of the petition was cited *Ex parte Myerscough.*(a)

THE MASTER OF THE ROLLS:—This petition is entitled in the matter of the estate of Mary England deceased, and the petitioner is the sole executor of the will. It is in effect a petition for the partial administration of Mary England's estate, which can be done only upon a bill filed for that purpose, and no order, therefore, can be made upon this petition. If the petition had been entitled in the matter of the two infants, and had been the petition of the infants, I should have made an order referring it to the master to appoint a proper person to act in the nature of a guardian to these infants,[1]

(a) 1 Jac. & Walk. 151.

[1] Where three infant children were entitled under a will, which was silent as to the appoint-

and to inquire whether it would be for their benefit that the sum of 300*l.* should be raised out of their shares of the residuary estate of Mary England, in order to defray their expenses to India; and upon the master's report that it would be for their benefit, and with the consent of the executors of Mary England, I would order the 300*l.* to be raised accordingly and paid to the person appointed to act in the nature of a guardian.[1]

With respect to the 500*l.* which has been the expense of the maintenance and education of these infants, and which was incurred before the death of Mary England, this can form no debt upon the property acquired by her will, and no order can be made for raising it.[2]

[*501] *To save expense, I will permit the petition to be amended in the manner which I have mentioned.

The petition was afterwards amended, and the order was made accordingly. (*a*)

ment of a guardian, to the sum of 40,000*l.* equally at twenty-one, and their father's income did not exceed 500*l.* a year, maintenance was allowed, the court assuming the superintendence of the fortune, but not of the persons in such cases: the father being guardian of his children by title paramount and of common right, and the court only interfering with that right to guard in particular cases against a prejudice to the children, in which case the person appointed to take care of the persons, during the lifetime of the father, is *quasi* guardian, or curator only, and not completely guardian. *Barry* v. *Barry*, 1 Mol. 213.

[1] A testator gave his residuary estate to an infant, and directed 60*l.* a year to be allowed for his maintenance. The residue was of large amount: and the court from time to time, considerably increased the maintenance. *Josselyn* v. *Josselyn*, 9 Sim. 63.

[2] Where a father died intestate, leaving a large real and personal estate, it was held that the mother was entitled to be allowed, out of the portion of the estate belonging to the children, for their maintenance during infancy; and *that* for the time past, as well as for the time to come. *Wilkes* v. *Rogers*, 6 Johns. Rep. 566. A testator bequeathed an annuity to his grand daughter to be applied whilst she was under age, in and towards her maintenance and education, in such manner as his trustees should in their absolute and uncontrolable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the court declared that, in the event of its appearing, that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past, and until further notice: he undertaking properly to maintain and educate her, and to abide by the order of the court. *Stephens* v. *Lawry*, 2 Yo. & Coll. C. C. 87. And see *Stopford* v. *Lord Canterbury*, 11 Sim. 82.

(*a*) See *Ex parte Swift*, *Ex parte Chambers*, post, pp. 575, 577.

*Naylor v. Arnitt.

Rolls.—1830; May.

A testator devised lands to trustees upon trust, out of the rents and profits to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and, after the decease of the survivor, he devised the lands to their children: Held, that the trustees could grant a valid lease of the lands for a term of ten years.

William Naylor devised all his real estates to Francis Arnitt and William Morrel, their heirs and assigns, upon trust, out of the yearly rents and profits, to pay his wife Elizabeth Naylor, the yearly sum of 60*l.* during her life, which annuity was also secured by a power of entry and distress, and to Miriam Bolton an annuity of 10*l.*, and subject to these annuities, to permit and suffer William Horner Naylor to receive and take the rents, issues, and profits during his life; and after his decease, to permit and suffer Elizabeth, the wife of William Horner Naylor, to receive the like rents, interests, and proceeds, provided she so long continued his widow; with limitations over in favor of their children. Power was also given to the trustees, with the consent of William Horner Naylor in his lifetime, and after his decease, at their sole discretion, to sell any part of the real estate for the purpose of raising money for the advancement of any of the children.

A few weeks after the death of the testator, the trustees granted to Simpson a lease of the lands for ten years.

William Horner Naylor had children who were infants. [*502]

The bill was filed by the tenants for life against Arnitt the surviving trustee, and Simpson, principally for the purpose of setting aside the lease.

It was alleged that the lease had been granted fraudulently and corruptly: but it was admitted in the argument, that the plaintiffs had not made out a case of fraud and collusion: and the question then was, whether the trustees had, under the will, power to grant a lease for a term of years.

Mr. *Pemberton* and Mr. *T. Parker* for the plaintiffs, argued that the will did not give the trustees any discretionary authority in the management of the estate, and that the purposes of the trust were not such as to render it necessary that they should have a power of leasing. Their duty was merely to let the lands from year to year, and to apply the rents so accruing in the manner directed by the will. A lease granted by them ought not to bind the *cestuis que trust*, except to the extent of the interest of such of the *cestuis que trust* as had assented to it.

Mr. *Bickersteth* and Mr. *J. Russell*, contra.

The Master of the Rolls held, that the trustees had power to demise the lands for a term of ten years; and declared the lease valid.

[*503] *Byam *v.* Munton.

Rolls.—1830; May 4.

A bequest of a moiety of the interest of the residue of the testator's personal estate, held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty.

Anthony Munton disposed of the residue of his property in the following words:—"I give and bequeath all my real estates, and all the rest, residue, and remainder of my personal estates and effects whatsoever and wheresoever unto my wife, Hester Munton, my brother, the Rev. William Munton, and my sister in law, Ann Byam; and I direct them, or the survivor of them, to dispose of and convert into money, as soon as conveniently may be, such part thereof as shall consist of money or securities for money, and to call in and receive all debts and moneys due to me, and to lay out and invest the whole of my real and of my residuary personal estate in the names of them, or the survivors or survivor of them, in the public stocks or funds, or permanent government or real security or securities, at interest; and I give and bequeath the interest, dividends, and produce *of the whole of my real estate, and of the residue of my personal estate*, or the securities in which the same may be invested, to my dear wife, Hester Munton, for and during the term of her natural life for her own use and benefit; and, after the decease of my dear wife, I give and bequeath one full and clear moiety of the interest, dividends, and produce of the *residue of my personal estate and effects*, or the stocks, funds, or securities in which the same shall be invested, to my brother, the Rev. William Munton, his executors, administrators, and assigns; and I give and bequeath the other full and clear moiety of the interest, dividends, and produce *of the residue of my personal estate* and effects, or the stocks, funds, or securities in which
[*504] the same shall be invested, to my sister in law, Ann Byam, for and during the term of her natural life, for her own use and benefit; and, after the decease of my sister in law, Ann Byam, I give the *whole of the principal of such moieties, or the whole residue of my estate whatsoever and wheresoever*, and the stocks, funds, and securities in which the same shall be invested, and the interest, dividends, and produce thereof, to my brother, the Rev. William Munton, his heirs, executors, administrators, and assigns, to and for his or their use and benefit."

The question was, whether the bequest of a moiety of the interest, dividends, and produce "of the residue of my personal estate," did or did not upon the whole tenor of the will, give Ann Byam a moiety of the rents of the real estates till sold, and afterwards of the interest of the proceeds arising from the sale of them, as well as a moiety of the interest of the residue of the produce of the testator's personal estate.

Mr. *Wray* and Mr. *Goodeve*, for the plaintiffs.

Mr. *Bickersteth* and Mr. *Bethel*, for the heir.

Mr. *Pemberton* and Mr. *Simpkinson*, for other defendants.

The Master of the Rolls said, that the testator had made one mixed fund of the residue of the personalty, and the proceeds of the sale of the real estate; that the whole was to be invested in government stocks or on real securities, and the interest was to be paid to the widow during her life; that there was no intention that, upon her death, a division should take place of the personalty, from the produce of the realty; and, in fact, such a division could not be made; that therefore the testator, *in the [*505] moiety given to Ann Byam during her life, meant to include the real estate; and that this conclusion was strengthened by the clause immediately following, in which the testator used the phrase "the whole of the principal of such moieties," as synonymous with and equivalent to "the whole residue of my estate whatsoever and wheresoever," and which was consequently, a declaration that the moieties of which he spoke were moieties of the whole residue of his estate.

His Honor, therefore, declared that Ann Byam, upon the death of the testator's widow, became entitled during her life to a moiety of the rents of the testator's real estates, till they were sold, and afterwards to a moiety of the interest arising from the net proceeds of the sale, as well as to a moiety of the interest of the residue of the personal estate.

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*Davis v. Thomas. [*506]

Rolls.—1830; May 5. L. C.—1831; July 7, 14, 25.

Though, in cases of non-payment of money, the court will relieve against penalty or forfeiture; yet when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly.

The plaintiff, being entitled to the equity of redemption of a certain estate, conveyed the same by a deed of release, dated the 29th of September, 1820, to Mrs. Twyning, the mortgagee, in consideration of 1800*l.*, which was made up of the mortgage debt, and of an additional sum of money paid to him. On the 1st of January, 1821, the mortgagee demised the estate to the plaintiff for a term of ninety-nine years, determinable on the death of the survivor of him, his wife, and son, at a rent of 105*l.*, payable half yearly at Lady day and Michaelmas; and on the lease there was endorsed an agreement signed by the mortgagee, by which it was stipulated, that, in case the plaintiff regularly paid the rent due at Lady day by the 4th of June, and the rent due at Michaelmas by the 26th of October, he should be at liberty to repurchase the premises at the price of 1850*l.* at any time within five years; but if default were made in the payment of the rent within the stated periods, the agreement was to be void. The plaintiff failed in the payment of the rent at the

periods stated, and distresses for it had been levied on the premises; but within the five years, he applied to repurchase, and at the same time tendered the arrears of rent then due. The defendant refused to permit the repurchase: and the bill was filed by the plaintiff to have the benefit of the stipulation in that respect, or to be let in to redeem.

The bill imputed fraud to the defendant, and represented the es-
[*507] tate as having been, in 1820, worth about *3000*l.* but these allegations were not established by the evidence.

Mr. *Pemberton* and Mr. *Parker*, for the plaintiff:—This case rests upon the same principle with those in which the court has interfered to relieve against the non-payment of rent at a day certain: and as the court by giving interest can make compensation for the delay of payment, the relief prayed ought to be granted.

A conveyance with a right of repurchase is in the nature of a mortgage: it is a mere security for a sum of money. *Mellor* v. *Lees*,(*a*) *Floyer* v. *Lavington*,(*b*) *Willett* v. *Winnell*.(*c*) The right of repurchase must have been in the contemplation of the parties when the terms of the purchase were settled.

Mr. *Bickersteth* and Mr. *Wakefield*, contra, insisted that the agreement, giving the right of repurchase on certain conditions, was a transaction totally distinct from the purchase; that the right did not arise unless this condition was strictly fulfilled; and that the payment of the rent within specified periods had been made of the essence of the contract.

The Master of the Rolls:—In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest.[1] But where there is no
[*508] stipulation for penalty or forfeiture, but a privilege is conferred, *provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly:—as in a case of interest reserved on a loan at 5 per cent. with a proviso that 4 per cent. will be accepted, if paid within a limited time after it becomes due;—or in the case of a covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted that the rent was not duly paid at the stipulated times, and no fraud, surprise, or accident is alleged; and the plaintiff is, therefore, not entitled to the repurchase which he claims by this bill; and the bill must be dismissed with costs.

1831; *July* 7.—The plaintiff appealed from his Honor's decree.

Sir *Edward Sugden* and Mr. *Parker*, for the plaintiff:—Once a mortgage,

(*a*) 2 Atk. 494. (*b*) 1 P. W. 268. (*c*) 1 Vern. 488.

[1] Upon the breach of a condition subsequent which would work a forfeiture, or divest an estate, a court of equity, acting upon the principle of compensation, will interpose and prevent the forfeiture or divestment, provided compensation can be given with certainty in damages. *Wells* v. *Smith*, 2 Edw. Ch. Rep. 78.

always a mortgage, is an invariable rule. Before the right to redeem can be destroyed, the nature of the transaction must be altogether changed. The naming of a day, within which the repurchase is to be made, amounts to nothing; for that is no more than is done in every mortgage deed. The law does not allow a redeemable security to be converted into an absolute estate, nor can the right of redemption be clogged or restricted by conditions. *Floyer* v. *Lavington*,(*a*) *Willett* v. *Winnell*,(*b*) *Mellor* v. *Lees*.(*c*) It is a continuing right which subsists independently and in defiance of agreement. The court looks with the utmost jealousy upon clauses of repurchase, which are generally mere shifts to get rid of the redeemable character of the securities, or to obtain a higher rate of interest than the *law allows. [*509] If, indeed, a man comes in clearly as an absolute purchaser in the first instance, the seller may there without danger be permitted to stipulate for a limited right of repurchase; but here the alleged purchaser was originally a mortgagee. All the instruments form parts of one and the same transaction: for the mere lapse of a few months, which were no doubt allowed to intervene as a blind, cannot disguise the real nature of the proceeding. *Herring* v. *Brown*.(*d*) The whole of the circumstances strongly corroborate this view of the conduct of the parties. The plaintiff was under the pressure of pecuniary difficulties, and had no professional adviser. The property, it appears, was worth upwards of 3000*l*.; and there was no formal conveyance to the purchaser, who merely took a release of the equity of redemption, and was never let into possession. The possession remained unchanged, a circumstance affording a clear proof, that there must have been some private understanding, to which the plaintiff's continuance in possession is to be referred. The rent fixed exceeds by a trifle 5 per cent. upon the sum advanced; and the demise, therefore, was most probably a device to evade the statutes against usury.

The court has never held time to be of the essence of the contract with respect to the payment of rent; and, all rent being tendered or paid up, the party is bound specifically to execute his contract. The legislature has provided a special remedy for the landlord, in case the rent be not regularly paid; and equity will not deal more hardly with a party in default than the law. The statute(*e*) has given to the defendant her rent and interest, or, if she prefers it, a forfeiture of the lease. *Courts of equity, [*510] however, have gone a step further, and established as a principle, that, where the party failing to perform the act stipulated can restore matters to the same state (which can always be done where nothing more than money payment is required,) relief will be given against the penalty or forfeiture, on full compensation being made. *Marks* v. *Marks*,(*g*) *Astley* v. *Weldon*,(*h*) *Seton* v. *Slade*. (*i*)

(*a*) 1 P. W. 268. (*b*) 1 Vern. 488. (*c*) 2 Atk. 494.
(*d*) 1 Vent. 368. Carth. 22. 2 Show. 193. (*e*) 4 G. 2, c. 28.
(*g*) P. Ch. 486. 10 Mod. 420. (*h*) 2. B. & P. 346. (*i*) 7 Ves. 265.

The *Solicitor General*, (Sir *W. Horne*,) and Mr. *Wakefield*, contra:—It is clear upon the evidence, that this was not a mortgage but a sale. There is no proof beyond surmise, that the different proceedings constituted one transaction. On the contrary, the time that intervened between them (for the lease was more than three months posterior to the conveyance, and that, two years posterior to the mortgage,) shows that they were distinct and independent. Supposing, however, that the mortgage could be connected with the sale, and that the sale and the demise had been contemporaneous, still the clause of repurchase, though inserted in favor of one who had formerly been a mortgagor, must be construed strictly; and if he has neglected to perform the act which was made the condition of his obtaining the indulgence now sought, he can have no claim to the assistance of the court. It was so decided in *Ensworth* v. *Griffiths* (*a*) in the house of lords; and the language of the lord keeper in *Barrell* v. *Sabine* (*b*) supports the same doctrine. The stipulation, which, if fulfilled, was to be the foundation of his title—the punctual payment of the rent—constitutes a condition precedent against [*511] *a breach of which equity will not give relief. In fact that title has never arisen; and the object of the plaintiff in the present suit is not so much to be relieved against the forfeiture of a right once acquired, as to create and enforce a new right at the defendant's expense.

It was clearly of the essence of the contract that the rent should be paid regularly, and that if any failure took place in that particular, no benefit should be claimed from the proviso. The words imposing that restriction on the right of repurchase are as strong as possible; and effect must be given to their obvious meaning, unless the last clause in the agreement is to be struck out and treated as a nullity.

July 14.—Sir *Edward Sugden*, in reply:—The continuance of the plaintiff in possession has not been explained. According to the defendant's own showing, there must have been a period during which the plaintiff occupied the lands without a title: for the purchase was made at one period, and the lease was granted at another, three months afterwards. It has been found convenient for the defendant's argument to keep those two transactions as widely as possible apart. Upon what ground could the vendor be suffered to retain the property in his hands without any title (and none is alleged) from September till the following January? His possession must be referred to the same agreement with the execution of the release, and it then becomes apparent that all the proceedings are parcel of one entire transaction. The several instruments, the mortgage, conveyance, and demise, which compose so many links in the chain, all amount to this—that the plaintiff [*512] should pay a higher rate of interest than the law *permits, and that if he could repay the principal within a certain time, he should then get back the estate. The right reserved to the plaintiff is nothing but a

(*a*) 5 B. P. C. Toml. ed. 184. (*b*) 1 Vern. 268.

power to redeem within a limited period. In *Barrell* v. *Sabine*, possession was delivered immediately, and the purchaser had never been a mortgagee. *Ensworth* v. *Griffiths* is strongly in the plaintiff's favor; for there had been five years' possession there, and the words were extremely stringent as to time and yet redemption was decreed.

July 25.—The Lord Chancellor(*a*):—In this case the plaintiff mortgaged certain property to a person of the name of Twyning for 1200*l.* and in the year 1820 he borrowed a further sum of 200*l.* on the same security. On the 29th of September, in that year a deed of release was executed by the plaintiff, whereby he, for a valuable consideration, released the equity of redemption to the defendant the morgagee. On the 1st of January, 1821, the defendant demised the premises to the plaintiff at a rent of a hundred guineas a year for ninety-nine years, and upon that demise was endorsed the agreement on which the present question turns.

It was first said at the bar that this all formed one transaction, and that you cannot in any way convert a mortgage, which is in its nature redeemable, into an irredeemable security. It was next contended that time was immaterial, and that the non-payment of the rent within the period stipulated ought not to be a defeasance of this sort of condition, or to exclude the party from the benefit of his claim: a claim which I am inclined to agree with [*513] his honor, in viewing rather in the light of an indulgence than of a strict right.

As to the first of these grounds, even if this were not a question of mortgage made two years before, but to be treated as a sale in 1820, with an agreement for a repurchase three or four months afterwards, I cannot regard the whole of these proceedings as one and the same transaction. Upon the best attention which I have been able to give to the whole of the evidence, I see no ground whatever for asserting that these various instruments all constitute one transaction. I think the testimony, by which the imputations of fraud were attempted to be sustained, entirely fails: and with respect to the overvalue, the evidence is in my opinion quite inconclusive; for, instead of the value amounting, as was alleged, to 3000*l.* and upwards, it is distinctly stated in the depositions that the property was not at the time worth more than 2000*l.*

With respect to the redeemable or irredeemable nature of the security, several cases were cited; among the rest, *Mellor* v. *Lees*,(*b*) where Lord Hardwicke has said, that, if fetters were laid upon the right of redemption, with a fraudulent design to get an estate, it would not avail. And clearly it would be so even if there were no fraudulent design, inasmuch as the case supposed by his Lordship is inconsistent with the nature of the security; mortgage for the sole purpose of securing money being the substance of the

(*a*) Lord Brougham. (*b*) 2 Atk. 494.

transaction, and the rest being an accessary only which must follow the nature of the principal.[1]

[*514] *Upon the other question, can I reasonably hold, that where a man has mortgaged an estate, and two years afterwards has made a conveyance of that estate, and then, again, three months subsequently, upon obtaining a lease of the same estate from the purchaser, procures to be endorsed upon that lease, by way of indulgence, a power to repurchase the property on certain terms,—can I reasonably hold, that, because he obtains this power of repurchase, all the different instruments form parts of one conveyance; And yet, unless I am to hold that, and unless I am to lay it down moreover, that the man, who possesses such a right of repurchase, though acting with his eyes open, and using words the most stringent (and no words can be stronger than those which are employed here,) to make time of the essence of the contract, can never, in any event, deprive himself of the benefit of that contract, I cannot possibly arrive at the conclusion that the decision of his honor ought to be reversed.[2] Looking to the language of the condition, which is positive and express, I cannot say that the plaintiff comes in due time, or that he has entitled himself by his conduct to the benefit which he now claims.[3]

Appeal dismissed.

[1] "There is no principle in equity better settled, than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of the parties, tending to alter in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance, or assignment, was a mortgage in the beginning, the right of redemption is an inseparable incident and cannot be restrained or clogged by agreement. Though the conveyance be absolute in terms, yet if the intention appears to make it a redeemable estate, it will continue so until foreclosure; for the maxim of equity is, that an estate cannot be a mortgage at one time, and an absolute purchase at another. This is an elementary rule on this subject; and the object of it is, to prevent imposition and fraud upon the mortgagor." Kent, Ch. *Henry* v. *Davis*, 7 Johns. Ch. Rep. 42. *Flagg* v. *Mann*, 2 Sumn. 538.

[2] Parties may so frame a contract for the sale of land as to make the time of payment a material part of the agreement: and where from the terms of the contract, it appears that the parties thereto intended that the purchasers should not have the land, unless the purchase money was actually paid at the day specified in such contract; if the money be not paid at the time, the court will not decree a performance of the contract. *Wells* v. *Smith*, 7 Paige, 22, 25. *Crippen* v. *Heermance*, 9 Paige, 211. *Benedict* v. *Lynch*, 1 Johns. Ch. Rep. 370. 1 Sim. & Stu. 598. n. 2. *Wiswall* v. *MacGowan*, 1 Hoff. Ch. Rep. 139. Time is of the essence of a contract, where the subject of the contract is of such a nature, as to be exposed to a daily variation in its value. *Doloret* v. *Rothschild*, 1 Sim. & Stu. 590. *Stubbs* v. *Lister*, 1 Yo. & Coll. C. C. 94.

[3] Equity cannot relieve from the consequences of a condition precedent unperformed. So, where S. sold a lot of land to W.; and by an agreement under the hands and seals of the parties, W. covenanted to build within a certain time, and give a bond and mortgage for a part, and pay the balance, or give a bond and mortgage for the whole, by a specified day, and S. covenanted to give a deed on that day. There was also a clause expressly showing that the agreement was in all respects to be void, provided W. failed to perform any one of the covenants. W. entered, but from untoward circumstances, and not from any act on the part of S. was not ready with his money, or the bond and mortgage, on the day specified in the agreement; but made a tender on the next day; it was held to be a condition precedent, and that the court could not relieve. *Wells*

*HUNLOKE *v.* GELL. [*515]

ROLLS.—1831; May 4, 5, 10.

Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution.

Construction of clauses in a settlement and will relative to allowances for the maintenance of younger children.

BY the settlement made on the marriage of the late Sir Thomas Windsor Hunloke, bearing date the 16th of October, 1807, certain estates in the county of Derby were conveyed to trustees and their heirs, upon trust for Sir Thomas Windsor Hunloke for life; and after his decease, to the intent and purpose that Ann Eccleston, the intended wife, might receive 1200*l.* a year for her life, by way of jointure; and subject thereto, to the use of Thomas Lord Viscount Anson and Thomas William Coke for a term of 1000 years; remainder to the use of or in trust for all and every or such one or more son or sons of the marriage; or any issue male of such son or sons as Sir Thomas should by deed or will appoint, and for want of appointment to the use of the first and other sons of the marriage in tail male; and for default of such issue to Sir Thomas Windsor Hunloke, his heirs and assigns.

As to the term of 1000 years thereinbefore limited unto Lord Anson and Thomas William Coke, it was declared that the same was limited upon trust that, in case there should be any child or children of Sir T. W. Hunloke by Ann Eccleston, his intended wife, other than such child or children as by virtue thereof, or by virtue of any appointment or appointments to be made in pursuance thereof, should be or become entitled to the whole of the lordships, manors, capital and other messuages, lands, and hereditaments therein before mentioned, or to some part or parts thereof, amounting in value to the sum of 3000*l.* or 2600*l.* as the case might be, according to the events next therein provided, then and in such case Lord Anson and Thomas William Coke, *or the survivor of them, or the heirs, executors, ad- [*516] ministrators, and assigns of such survivor, should, after the decease of Sir T. W. Hunloke, (or in his lifetime, if he should so direct,) by any deed or writing under his hand and seal, attested by two or more credible witnesses, by mortgage, sale, or other disposition of all or any part of the hereditaments comprised in the said term for all or any part of the said term, or by the rents and profits of the same premises, or any part thereof in the mean time, or by such other ways and means as therein mentioned; levy and raise, for the portion or portions of such child or children, the sums of money therein mentioned; that is to say, that if there should be but one such child, then the sum of 3000*l.* for the portion of that one child; and the same should be an interest vested in and paid to the child for whom the same was thereby intended to be provided, on or

v. *Smith*, 2 Edw. Ch. Rep. 78; affirmed with costs, 7 Paige, 22. When the transaction is a conditional sale, or a mortgage, see *Flagg* v. *Mann*, 2 Sumn. 490, 533, et seq. *Perry* v. *Meddowcroft*, 4 Beav. 197. *Williams* v. *Owen*, 10 Sim. 386.

at such age, day, or time and in such manner, and should be attended with such provision for his or her maintenance and advancement as Sir T. W. Hunloke should by any deed or deeds, instrument or instruments in writing, &c. or by his last will, &c. direct or appoint; and in default of such direction or appointment, the said sum of 3000*l.* should be an interest vested in such one child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years or on the day of her marriage, which should first happen, and should be paid to him or her, on or at the said age, day or time, if the same should happen after the decease of Sir T. W. Hunloke, but if the same should happen in his lifetime, then immediately after his decease; and if there should be two or more children for whom portions were intended to be thereby provided as aforesaid, but not more than six, then Lord Anson and T. W. Coke, and the survivor of them [*517] and the executors, administrators, and assigns of such *survivor, should, by the ways and means thereinbefore mentioned, levy and raise such sum of money as should be the amount of as many sums of 3000*l.* as there should be such children: and if there should be more than six such children, then the said Thomas Lord Viscount Anson, and Thomas Windsor Coke, and the survivors of them, and the executors, administrators, and survivors, should, by the several ways and means thereinbefore mentioned, levy and raise such a sum of money as should be the amount of as many sums of 2600*l.* as there should be such children; and the sum of money so intended to be eventually provided for portions as thereinbefore mentioned, should be an interest vested or interests vested in all and every or such one or more, exclusively of the other or others, of the children for whom the same respectively was intended to be thereby provided, and should be paid to him, her, or them respectively, on or at such age, day or time, or respective ages, days, or times, and divided between and among them, or any of them, and attended with such right or benefit of survivorship between or among them, and with such provisions for their or any of their maintenance and advancement in life, and subject to such conditions, and under such restrictions, and generally in such manner for their or any of their benefit, as Sir T. W. Hunloke by any deed or deeds, instrument or instruments in writing, &c. or by his last will, &c., should direct or appoint, and in default of any such direction or appointment, and so far as any such direction or appointment should not extend, the whole of the said sum of money intended to be thereby provided for portions, should be divided between or among the children, in respect to whom the amount of the same should be calculated, in equal shares and proportions,—the shares of sons to be an interest vested at their respective ages of twenty-one years, [*518] and the shares of daughters to be an *interest vested at their respective ages of twenty-one years or days of marriage, which should first happen, and to be paid to them respectively, on or at the same ages, days or times respectively, if the same should happen after the death of the said

Sir T. W. Hunloke; but if the same should happen in his lifetime, then immediately after his decease: and it was thereby declared that, if there should be two or more children for whom portions were intended to be thereby provided, and any one or more of them should die without having obtained a vested interest in the portion provided for him, her, or them respectively, then, unless Sir T. W. Hunloke should in exercise of his power of appointment expressly direct the contrary, the portion intended to be provided for the child or children so dying should not survive to the other or others of the children, but should sink into and be consolidated with the freehold and inheritance of the said manors and hereditaments; and further, that no child, taking or becoming entitled to any share of the money intended to be thereby provided for portions under an exercise of the power of appointment thereinbefore given to the said Sir T. W. Hunloke, should be entitled to any share of the unappointed part of the said sum of money, without bringing his or her appointed share of the same into hotchpot and accounting for the same accordingly.

And upon this further trust that Lord Anson and T. W. Coke, or the survivor of them, his executors, administrators, or assigns, should, from and after the the decease of Sir T. W. Hunloke, out of the rents, issues, and profits of the said hereditaments and premises, raise and pay such yearly sum and sums of money for the maintenance and education of such child or children for the time being presumptively entitled to portions, in the mean time and until his, her, or their respective portion or portions should become due and payable respectively, as to the same trustees or the *survivors of [*519] them, his executors or administrators, should seem meet, not exceeding for any one such child what the interest of his or her then presumptive portion would amount to after the rate of 5*l.* for every 100*l.* by the year; such yearly sum or sums for maintenance to be paid and payable half-yearly; and it was provided that it should be lawful for Lord Anson and T. W. Coke, and the survivor of them, and the executors, administrators, and assigns of such survivor, after the death of Sir T. W. Hunloke, or in his lifetime, at his request in writing, to raise by virtue of the term, any sum or sums of money for the preferment or advancement in the world of any such child or children during his or her or their minority, not exceeding the amount of his or her or their future or expectant portion or portions; and if such advanced sum or sums of money should be equal to the whole of such expectant portion or portions, the same should be accounted in full satisfaction of the whole thereof accordingly; but if such advanced sum or sums should be less than such expectant portion or portions, the same was to be received and accounted as part, and was to be deducted out of the portion or portions of such son or sons respectively for whose use and benefit the same should be so applied, so always that the sum or sums to be raised for any one such child during his or her infancy were not contrary to or inconsistent with any such direction or appointment as Sir T. W. Hunloke in his lifetime should make or execute touching the raising and paying the portion or portions of such child or chil-

dren. It was also declared that the said manors and hereditaments were limited to Lord Anson and T. W. Coke, their executors, administrators, and assigns for the said term of 1000 years, upon the further trust that, after the decease of Sir T. W. Hunloke, and subject and without prejudice to the said annual sum of 1200*l.* thereby limited to the said Ann Eccleston, and [*520] subject to *the trusts before expressed for raising portions for the daughters and younger sons of the marriage, Lord Anson and T. W. Coke, and the survivor of them, and the executors, administrators, and assigns of such survivor, during the minority or respective minorities of any person who, under any of the limitations thereinbefore contained, or any exercise of the power of appointment thereby limited to Sir T. W. Hunloke should be entitled to the said manors and other hereditaments in remainder immediately expectant on the said term of 1000 years, should receive the yearly rents, issues, and profits of the said manors and other hereditaments, and apply a competent part of the same for or towards the maintenance, and education, and support of the person so for the time being entitled as thereinbefore mentioned, and lay out and invest the residue of the same in their or his names or name in the purchase of parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England, to be from time to time altered and varied at their or his discretion, and should receive the interest, dividends, and annual produce of the said sums of money, stocks, funds, and securities, and lay out and invest the same in their or his names or name in or upon other stocks, funds, and securities of a like nature, and repeat such receipts, layings out, and investments so and in such manner that the said issues, rents, profits, stocks, funds, securities, interest, dividends, and annual produce, and the resulting income of the same respectively might during any or every such minority as aforesaid accumulate in the nature of compound interest; and that Lord Anson and T. W. Coke, and their executors, administrators, and assigns, should stand and be possessed of and interested in the said rents, moneys, stocks, funds, and securities, and the interest, dividends, and annual produce of the same, and the resulting income thereof, [*521] *and the accumulations thereof, in trust for all and every and such one or more exclusively of the other or others of the child or children or remoter descendant or descendants of Sir T. W. Hunloke by the said Ann Eccleston as Sir T. W. Hunloke should by any deed or instrument in writing, &c. or by his last will, &c. direct or appoint: and in default of such direction or appointment, in trust for all and every the child and children of the said Sir T. W. Hunloke by the said Ann Eccleston, who being a son or sons, and not for the time being entitled as thereinbefore mentioned, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, to be divided between or among the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one child; and if there should be no such child, should lay out and invest the same in the purchase of freehold or copyhold messuages, lands, tenements,

and hereditaments, and settle and assure the same to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations thereinbefore expressed and then subsisting, or capable of taking effect.

The marriage took effect. Sir Windsor Hunloke died in the month of January, 1816, leaving his wife and one son and two daughters him surviving; and having made a will dated the 16th of January, 1816, which was in the words following:—

"Short heads of the will of Sir Thomas Windsor Hunloke, usually residing at Wingerworth in the county of Derby, Bart., but now at Paris, No. 87 Rue de Grenelle Fauxbourg St. Germain, parish of St. Thomas D'Aquin:—All my estates and effects real and personal, I do give to my son Henry Thomas John Joseph Hunloke, his heirs and assigns, so soon as he shall have attained the age of twenty-one years, subject to the annuities and *payments hereinafter named; remainder to my brother James Hunloke, and to his son or sons lawfully begotten; remainder to my two daughters Charlotte and Eliza Hunloke, as co-heiresses, and to their heirs and assigns; remainder to any daughters my brother James may have, and to their heirs and assigns as co-heiresses; remainder to my heir at law: 1200*l.* to be paid yearly to Lady Hunloke during her life, and the Dowager Lady Hunloke's life; and in case the dowager should first die, then Lady Hunloke to have 1500*l.* per year for the remainder of her life; 500*l.* per year to be paid to Lady Hunloke, to be applied to the maintenance and education of my son Henry, until he shall have attained the age of twenty-one years, and 200*l.* per year additional for the last two years of his minority; 450*l.* per year to be paid to Lady Hunloke for the maintenance and education of each of my two daughters before named, until they have attained the age of twenty-one years respectively, and then to be paid 200*l.* per year each additional, till death or marriage; and in case of marriage, then the annuity to cease, and to receive 3000*l.* to their fortune, in addition to the 3000*l.* already provided for them by Lady Hunloke's marriage settlement; 400*l.* per year to be paid to my brother James Hunloke during his life, over and above any sum or sums that may have been secured to him on my estates by any former will or wills; 350*l.* per year to be paid to each of my two sisters, Margaret and Charlotte Hunloke, during their respective lives, over and above any sum or sums that may have been secured to them on my estates: and in case my son Henry should die before he has attained twenty-one years of age, and my estate should come to my brother James, I do then direct that my two daughters have 20,000*l.* each to their fortunes on marriage as aforesaid; and if either of them should die before she is entitled to her fortune, then the survivor to have 10,000*l.* additional on marriage." [*522]

*The testator was seised of estates of considerable value, which were not comprised in the settlement; and, in the year 1821, an act of parliament was passed to enable certain trustees to sell these un- [*523]

settled estates for the purpose of paying off incumbrances, and creating a fund to answer the charges under his will. The unsettled estates were accordingly sold, and after discharging all incumbrances, there remained a considerable surplus.

The accumulations which had been made by the trustees of the 1000 years' term from the death of Sir Thomas Windsor Hunloke, amounted to a very large sum.

The present bill was filed by the only son, who was still an infant, for the purpose of carrying into effect the trusts of the settlement and will.

One of the two daughters had attained the age of twenty-one years; the other was still under twenty-one; and both were unmarried. The mother of the testator was dead. The trustees of the 1000 years' term had from time to time advanced certain sums for the maintenance and education of the son, which did not amount to the 500*l.* a year mentioned in the will of the father; and had also from time to time advanced to Lady Hunloke certain sums for the maintenance and education of the daughters, which were less than the sums of 450*l.* a year mentioned in the father's will.

The material question in the cause was, whether the will could be considered a good execution of the power given to Sir Thomas Windsor Hunloke by the settlement.

On the one hand it was argued, that in the will there was no re-
[*524] ference to the power; that the words used *were all words which, in their natural sense, were fitted to pass interests which the testator could devise; that the words could be satisfied without having recourse to the subject of the power; and, that there was no indication of an intention, on the part of the testator, to effect any thing otherwise than by devise.

On the other side, reference was made to various directions in the will, which, it was alleged, showed that the testator considered himself to be dealing with the subject of the power; and if he meant to deal with the subject of the power, he must necessarily have meant to execute the power. *Lewis* v. *Lewellyn*,(*a*) *Denn d. Nowell* v. *Roake*,(*b*) *Napier* v. *Napier*,(*c*) *Lownds* v. *Lownds*,(*d*) *Colpoys* v. *Colpoys*,(*e*) *Standen* v. *Standen*,(*g*) were cited.

Another question was, whether Lady Hunloke was entitled to have the sums, which had been advanced to her by the trustees for the maintenance and education of her children, made up to her so as to amount to 500*l.* a year for the son, and 450*l.* a year for each of the daughters from the death of her husband, during their respective minorities, and out of what fund such addition should come. As incidental to the discussing of this question, one point which came under consideration was, whether the testator could give his daughters maintenance out of the settled estates, exceeding the interest of the portions to which they were entitled under the settlement.

(*a*) 1 Turn. & Russ. 104. (*b*) 5 B. & C. 720. (*c*) 1 Sim. 28.
(*d*) 1 Y. & J. 445. (*e*) Jac. 451. (*g*) 2 Ves. jun. 589.

Mr. *Pemberton* and Mr. *Munro*, for the plaintiff.

Mr. *Bickersteth* and Mr. *Blunt*, for the daughters.

*Mr. *Tinney* and Mr. *Loftus Lowndes*, for Lady Hunloke. [*525]

Mr. *Roots* and Mr. *Jacob*, for other parties.

THE MASTER OF THE ROLLS:—The material question here is, whether upon the will it is manifested that the testator had in his view the property over which he had the power of disposition by the settlement; and I am of opinion that it does appear by the contents of the will, that the testator intended it should operate upon the settled as well as the unsettled estates.[1] It is plain that the settlement was present to his mind, because, in providing portions for his daughters, he expressly refers to it. By the settlement he had the power to limit an estate tail to his son; and in default of issue, he had in himself the reversion in fee of the settled estate. And it was well observed in the argument at the bar, that this reversion in fee would pass by the remainder limited in the will to his brother James Hunloke and his sons; and that it necessarily follows, that, by the prior limitation to the testator's son, he intended him to take all that would pass by the remainder. Moreover, speaking of the 1200*l.* a year to Lady Hunloke, he plainly refers to the settlement. By the settlement, the allowance for the maintenance and education of the son was to be at the discretion of the trustees, and when by his will, he fixes the allowance at 500*l.* a year, he must be understood to mean, that such sum should not be an addition to, but should comprise the allowance for the maintenance and education given by the settlement. By the settlement, the allowance for the maintenance and education of daughters

[1] In a late case, in which he has elaborately examined the subject of the construction of wills in reference to the execution of powers, Mr. J. Story remarks:—"The authorities upon the subject may not all be easily reconcileable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively, or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree, that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts or deeds, demonstrating the intention.—Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power; (1) where there has been some reference in the will or other instrument to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or, where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity: in other words, it would have no operation, except as an execution of the power." *Blagge* v. *Miles*, 1 Story's Rep. 426, 446. And see *Farmer* v. *Bradford*, 3 Russ. 354. *Adams* v. *Austen*, id, 461. *Walker* v. *Mackie*, 4 Russ. 76. *Grant* v. *Lynam*, id, 292. *Bailey* v. *Lloyd*, 5 Russ. 330. *Hughes* v. *Turner*, 3 Myl. & K. 666. *Bradish* v. *Gibbs*, 3 Johns. Ch. Rep. 551. *Buxton* v. *Buxton*, 1 Keen, 753. *Curteis* v. *Kenrick*, 9 Sim. 443. *Churchill* v. *Dibben*, id. 447, n. *Morrice* v. *Langham*, 11 Sim. 274. *Hyer* v. *Burgen*, 1 Hoff. Ch. Rep. 18. 3 Russ. 359, n. 1. 1 Sim. 37, n. 1.

was left in his power, and if he did not exercise such power, it was not to exceed the income of their portions; and when by his will he fixes [*526] maintenance at 450*l.* a year, it *cannot be intended that he meant that they should take also the income of their portions under the settlement. Upon the whole, therefore, his will manifestly extends to the settled as well as to the unsettled property, and is an execution of all powers given him by the settlement.

The son therefore, attaining twenty-one, will take the fee in all the estates. Lady Hunloke, in addition to the 1200*l.* a year under the settlement, will take 300*l.* a year for her life from the unsettled property; and is entitled, out of the unsettled property, to have the sums advanced to her by the trustees for the maintenance and education of her son made up to 500*l.* a year from the death of the testator, with an addition of 200*l.* a year for the last two years of his minority. She is also entitled to have the sums advanced to her by the trustees for the maintenance and education of her daughters made up 450*l.* a year for each during their minorities, not out of the unsettled, but out of the settled property, inasmuch as the testator had the power by the settlement of fixing the amount of their allowance. The daughters as they attain twenty-one, will be entitled to receive out of the accumulated funds an annuity of 600*l.* until marriage and then to receive a portion of 6000*l.*; and if they should not marry, they will have a power of disposing at their deaths of their original portion of 3000*l.* under the settlement. This effect will be produced upon the principle of election; it being plain that the testator meant, that the annuity of 450*l.* should be substituted for their original and additional portions of 3000*l.* until marriage.

The annuities to the father [brother] and sister [sisters] of the testator must be provided for out of the unsettled property; and it must be referred to the master to take an account of what is now due to them in respect of these annuities.

[*527] *Stanley *v.* Robinson.

1830; May 11, 12.

Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons that he had no right to either rent or land, to agree to accept 10*l.* in full, for rent and land, the court will not entertain a bill for the specific performance of the agreement.

A defendant cannot avail himself of a matter in defence, which appears only upon his evidence and was not stated in his answer. But if the plaintiff, upon his own case, is not entitled to the relief prayed, the court will not assist him.

Joseph Robinson, the brother of the defendant, was at his death entitled to certain leasehold property held under the Earl of Shrewsbury. The plain-

tiff, Sir Thomas Stanley, in February, 1822, purchased the leasehold, of the executors of Joseph Robinson. The defendant was at the time, and had been for some years previously, in possession of a piece of adjoining land, which he claimed under his father. Sir Thomas Stanley at the same time became his tenant of this land at a rent of 6*l.* per annum, which was duly paid for the first two years. Some time afterwards a question was made by Sir Thomas Stanley, whether the land, which he thus rented from the defendant, was not part of the Earl of Shrewsbury's estate, and comprised in the lease which Sir Thomas Stanley had purchased from the representatives of Joseph Robinson; and a dispute arose respecting the payment of further rent to the defendant. In the month of June, 1824, the defendant attended, by appointment, at the mansion house of Sir Thomas Stanley, where he met the solicitor of Sir Thomas Stanley and the agent of the Earl of Shrewsbury, and the defendant then demanded 12*l.* for the two years' rent which had accrued due since the last payment, and offered to take 50*l.* for his interest in the land; but, being informed by Sir Thomas' solicitor and Lord Shrewsbury's agent that he had no property in the land, and no claim for rent, he was induced to give up his claim for rent, and all his right in the land for the sum of 10*l.* which was then paid to him; and he afterwards dined in Sir Thomas' servants hall, in company with the groom and coachman, who were examined in the cause as witnesses, to *prove his admission to them that he had made [*528] the agreement stated.

The defendant afterwards brought an ejectment to recover possession of the land; and this bill was filed by Sir Thomas Stanley praying the specific performance of the defendant's agreement, and that he might execute an assignment of his interest in the land.

The defendant in his answer stated, that the 10*l.* was paid to him on account of rent, and denied the agreement alleged in the bill.

Mr. *Temple* and Mr. *Rolfe* for the plaintiff.

Mr. *Spence*, for the defendant.

May 12.—The Master of the Rolls:—The agreement alleged in the bill is proved, but it by no means follows that the plaintiff is entitled to the relief prayed. The defendant being a man in an humble class of life, and without any advice or protection on his part, is induced to enter into the agreement stated, by the representations of two professional persons, that he had no claim for the rent, nor any right to the land. In this representation the two persons were mistaken. The plaintiff, being the tenant of the defendant, could not have escaped from the payment of the rent then due to the defendant, even if the latter had no right to the land;[1] and the defendant

[1] That a tenant cannot in general dispute his landlord's title, see *Attorney General* v. *Lord Hotham*, Turn. & Russ. 209. S. C. 3 Russ. 415. *Jackson* v. *Reynolds*, 1 Caines' Rep. 444. *Jackson* v. *Whitford*, 2 Caines' Rep. 215. *Jackson* v. *Vosburgh*, 7 John. Rep. 186. *Jew* v. *Wood*, Cr. & Ph. 185. *Woodward* v. *Brown*, 13 Peters 4.

being entitled, at all events, to receive 12*l.* for rent, this court will not compel him to perform an agreement into which he is surprised, and by which, in consideration of 10*l.* only, he is not merely to give up the 12*l.* due to [*529] him for rent, but is to assign all *interest which he claims in the land.[1] It is true that the defendant has not so shaped his defence and has, in his answer, denied the agreement. But the distinction is this: a defendant is not permitted to avail himself of a defence which appears only upon his evidence, and was not stated in his answer, so that the plaintiff could be prepared to repel it. But if it appears, upon the plaintiff's own case that he is not entitled to the relief prayed, the court will not assist him. The bill must be dismissed with costs.

Humphreys *v.* Wagstaff.

1830; May 12, 18.

Where tithes have never been paid since the dissolution, the court will presume all facts, which, consistently with the evidence in the cause, would give legal origin to an exemption from the payment of tithes.

The bill was filed by the impropriate rectors of the parish of Westham against the defendant, for the payment of the tithes of certain lands within that parish, in his occupation, known by the name of the Abbey Farm, and consisting of sixty-nine acres. The plaintiffs claimed under a grant from the crown made in 1820.

The defence set up by the answer was, "that the abbey of Stratford Langthorne was founded before the time of memory, and was one of the greater monasteries; that the monks thereof were of the Cistercian order; that the abbots and monks of the monastery were, at the time of the surrender and dissolution of the monastery, rectors of the rectory of Westham, and had been, time out of mind, seised in fee of the rectory and also of the land: that the land in question had been, during all the time aforesaid, and was at the time of the surrender and dissolution, part of the lands and posses- [*530] sions of the monastery, and was then part of their *demesne lands; and, being so part and parcel of the monastery, was, by bull or prescription, or some other lawful ways or means, wholly exempt from tithe, or the payment thereof, and had been, time out of mind, held and enjoyed by the abbot and monks of the monastery, for themselves, their farmers and tenants, freed and discharged from tithes, or the payment thereof."

"[1] A court of equity must be satisfied that the claim for a deed is fair and just, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before it will interfere with this extraordinary assistance [viz. specific performance.] If there be any well founded objections on any of these grounds, the practice of the court is to leave the party to his remedy at law for a compensation in damages." Kent. Ch. *Seymovr* v. *Delancy*, 6 Johns. Ch. Rep. 222, 225. *St. John* v. *Benedict*, id. 111, 112, 2 Story's Eq. § 769, 770.

1830.—Humphreys v. Wagstaff.

It appeared that the abbey of Stratford Langthorne, which was one of the greater abbeys, and was of the Cistercian order, was founded in the reign of Henry II., and was then endowed, among other property, with certain lands in the parish of Westham, the whole lordship of the same vill, and the churches of Westham and Lea. It was dissolved in the 29 Henry VIII.

Shortly after its foundation a vicarage was endowed; and, disputes having arisen between the monks and the vicar, judges delegate, acting under the authority of the pope, defined the nature and extent of the endowment in the following manner: "The vicar, whoever he may be, shall receive all oblations and obventions to the aforesaid church appertaining, other than the tithes of corn and pulse (*bladi et leguminum*,) which the aforesaid monks shall receive."

In 1516, a deed of composition real was made between the abbot and convent of the one part, and the vicar of the parish of Westham of the other part, whereby the vicar conceded to the abbot and convent from thenceforth, "the right of receiving all and singular the tithes, as well predial as personal, great, small, and mixed, to the aforesaid parish church belonging and appertaining, in consideration of a yearly stipend of 39*l.* 13*s.* 8*d.*"

*It was proved by the plaintiffs, that, in the 20th of Henry VIII., [*531] the abbot and convent demised to one Shaw for a term of fifty years a messuage and lands in the parish, together with the tithes of corn, grain, and hay, and all other tithes to the rectory belonging, "from and in all meadows, marshes, and pastures in Westham, being on the south part of the way called the Portway, in the parish of Westham, in as ample manner and form as John Shipman lately had and received the same to farm, except all lands, meadows, marshes, and pastures which the said abbot and convent now occupy for their household husbandry and cattle." There was also evidence that various other lands in the parish, belonging to the abbey, had paid tithes.

On the part of the defendant it was proved, that, although tithes had been regularly paid for all other lands in the parish, no tithes had been paid for the lands in question: and it was further proved, that a grant of lands, which had been part of the possessions of the abbey, was made in the 30th of Henry VIII. to one Newton in tail, and that James I. afterwards granted the reversion of the same lands. There was, in the names and descriptions of the lands so granted, some similarity to the names and descriptions by which the abbey farm had been conveyed to the present owners; but there was no proof that the identical lands, constituting that farm, had been part of the demesnes of the abbey, and comprised in the original endowment.

Mr. *Tinney* and Mr. *Lynch* for the plaintiffs:—The plaintiffs are entitled to the tithes sought by the bill, because there is no proof that the lands of the defendant belonged to the abbey before time of legal memory; and, especially, because, even if the lands had *belonged to the abbey, it [*532] has been proved that the vicar was entitled to the tithes until the deed

of composition in 1516, which was within time of memory: *Grendons* v. *Bishop of Lincoln*,(a) *Priddle* v. *Napper*,(b) *Slade* v. *Drake*,(c) *Fox* v. *Bardwell*,(d.)

It is beyond contradiction, that all the other lands of the monastery were subject to tithes: why should the lands in question be presumed to have a particular privilege? In none of the documents is there any reference to these or any other lands, as possessing the exemption which is now claimed. The title of the monastery to the tithes of the parish or church generally, except those of pulse and corn, is shown to have arisen from the real composition of 1516; and up to that time it must be assumed that the lands in question were subject to pay tithes to the vicar, as well as the other lands in the parish; for the endowment makes no exception in their favor. In the lease to Shaw, the tithes of the lands which were in the actual occupation of the monastery, including, of course, their demesne lands, are expressly excepted: such an exception would have been altogether unnecessary, if these lands had been discharged.

In the present case, the mere fact that the lands in question have not paid tithes, is not a sufficient ground upon which to raise a presumption that they are discharged by prescription; for the fact of non-payment is sufficiently accounted for by the circumstance, that, being the property, and in the occupation, of Cistercian monks, they would be discharged *ratione ordinis*, so long as they continued in the hands and manurance of these proprietors. [*533] To have laid a foundation *for a case of prescription, the defendant should have shown that his lands were in the possession of the monastery from time immemorial; whereas all that he has proved is, that certain closes in his occupation were parcel of the demesnes of the monastery at the time of the dissolution. It is quite consistent with all that he has proved, that they might have been acquired by the monastery only the preceding year.

Mr. *Bickersteth* and Mr. *Teed*, contra:—It is certain, that, before time of legal memory, the abbey was the owner of certain lands in this parish; these lands may have been discharged from tithes, and the lands in question may have been the lands so discharged. The exemption claimed might have had a legal origin; and the rule is, that, where the fact occurs of the non-payment of tithes as far back as evidence can reach, and that non-payment can be referred to a legal origin, the court will hold the lands to be discharged. *Monck* v. *Huskisson*.(e) In the present case, no circumstance exists to repel the presumption arising from the non-payment of tithes. Neither the endowment of the vicarage, nor the leases and accounts which have been referred to, show that all the lands in the parish were subject to tithes, but merely that there were tithes belonging to the church.

The Master of the Rolls:—The defence here is not upon the ground

(a) Plowden, 493. (b) 11 Rep. 14, b. (c) Hob. 300.
(d) Com. Rep. 498. (e) 1 Sim. 280.

of the union of the rectory and lands in the hands of the abbey, but upon the ground of a discharge by prescription. It must be taken that these lands have never paid tithes since the dissolution; and every presumption is to be *made in favor of an enjoyment of nearly 300 years. If, [*534] consistently with the evidence in the cause, it is possible that the discharge from tithes could have had a legal origin, the court is bound to confirm it. The plaintiffs principally rely upon the deed of real composition of 1516, as conclusive evidence that the lands could not, before that deed, have been discharged from tithes. Now that deed is a grant from the vicar of all tithes then belonging to the parish church; but, if the lands were part of the original possessions of the abbey in the time of Henry II., and were then discharged of tithes in the hands of the abbey, the deed of 1516 does not affect the question, because these tithes did not then belong to the church. I am of opinion that it is to be inferred that the lands were part of the possessions of the abbey in the time of Henry II., and that they were discharged of tithes before memory, because such facts are consistent with the evidence in the cause, and would give legal origin to the continued enjoyment since the dissolution of the abbey. The bill must, therefore, be dismissed, and with costs.

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*Cocker *v.* Quayle. [*535]

1830; May 19.

By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond: if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest.

In this case, by a marriage settlement, the interest of the trust fund was to be paid to the wife during her life for her separate use, but without power of anticipation; and after her death, to the husband for life, if he survived her; with remainder to the children of the marriage; and a power was given to the trustees, with the written consent of the wife, to lend the trust money to the husband upon the security of his bond. The trustees, with the consent of the wife, advanced the trust money to the husband, but without taking any bond from him. The husband afterwards became bankrupt.

The bill was filed by the husband and wife and the children of the marriage, for the purpose of compelling the trustees to replace the trust fund. It was stated in the answer of the surviving trustee, that the wife's written consent was given; but there was no evidence in support of the allegation; and it was not pretended that any bond had been taken from the husband.

At the hearing the defendants prayed an inquiry whether the wife had not given her consent in writing.

Mr. *Pemberton* and Mr. *T. Parker*, for the plaintiffs.

Mr. *Bickersteth*, Mr. *Wray*, and Mr. *John Wilson*, for the defendants:—A trustee, it was argued on behalf of the defendants, could not be made answerable, unless actual loss had been sustained in consequence of his breach [*536] of trust. Here the trustees were empowered to lend the fund to *the husband on the security of his bond: they had lent it to him without taking his bond. In the one case they would have had a demand on him by specialty; in the other the demand was merely for a simple contract debt; but, under the commission of bankrupt, the former species of debt would have had no priority to the latter; the fund, therefore, had sustained no loss which it would not have suffered equally, if the trust had been executed in the strictest manner.

If the trustees should be held answerable, yet, an individual, who assented to the breach of trust, or procured it to be committed, could not take advantage of their liability; and if that individual had any interest in the fund, it would be applied *pro tanto* in indemnifying the trustees from the responsibility which the court might throw upon them. That doctrine was acted upon by Lord Eldon in *Brice* v. *Stokes*,(*a*) where, though a trustee was made answerable for the principal of the fund, a *cestui que trust*, tenant for life, who had concurred in the breach of trust, was held not entitled to relief. It was recognized in *Underwood* v. *Stevens*.(*b*) In *Coltman* v. *Warren* decided in 1825, Lord Gifford applied the same rule against a married woman, who had acquiesced in the breach of trust which was the subject of complaint. Here both the wife and the husband procured the breach of trust to be committed, and acquiesced in it; they, therefore, were not entitled, in a court of equity to relief against individuals by whose conduct they had profited, and of whose mistake they were themselves the cause. If the court, on behalf of the children, ordered the trustees to replace the fund, that fund should be considered, in relation to the other plaintiffs, as having no existence; and [*537] till the interests of the children came *into possession, the dividends ought to be applied to the indemnification of the trustees. It was true, that the wife had not the power of anticipating the income arising from this property; but at present the question was not as to anticipation. She had by her own act annihilated the fund out of which that income was to arise; and she had no right to call upon the defendants to replace the fund for her benefit.

For the plaintiffs it was argued, that the moment the trustees lent the money to the husband, in a manner not warranted by the marriage settlement, they became answerable for the amount; and this liability could not be removed from them by any subsequent event. It could not be denied that they were liable the hour before the bankruptcy of the husband: how could his bankruptcy place them in a better situation?

(*a*) 11 Ves. 325, 326. (*b*) 1 Mer. 712.

In *Bryce* v. *Stokes*, the person whose life interest was applied in exoneration of the loss thrown upon the trustees, was fully competent to bind himself, and to raise, by his own acts, equities against his own claim; and, therefore, the decision there had no application to the case of a married woman. This lady had no power to anticipate the enjoyment of the fund; still less could she, even as against herself, endanger the safety of the capital. By no act or contract of hers could she have parted with the right to the interest or dividends to accrue in any future year; how, then, could she enable another person to raise against her an indirect equity, which was to deprive her of these dividends in all time to come? Even if she had not been excluded from the power of anticipation, the trustees could not have claimed to indemnify themselves out of her life interest. *Underwood* v. *Stephens*,(*a*) *Ryder* v. *Bickerton*.(*b*) In *the latter case a trustee, who had been guilty of a [*538] breach of trust, in which it was alleged that the husband and wife concurred, insisted, that he was not liable to make satisfaction to her during her life. But Lord Hardwicke held, that he had no defence against her claim. "The power of the wife," said his lordship, "must arise out of the articles, for, after the marriage, she had no power to prejudice herself. The power is, that she and her husband must give their consent to the placing out the money on security; therefore, she could not consent to the placing out the money on no security at all."

THE MASTER OF THE ROLLS:—The trustees cannot be excused from a breach of trust in lending the money without the security of the husband's bond, by reason of the subsequent event of the husband's bankruptcy. The inquiry asked for, as to the written consent of the wife, is immaterial, as it is not pretended that a bond was taken from the husband. Although the interest was to be paid to the wife for life for her separate use, yet she had not an absolute power of disposition of that interest, but a power qualified by the terms of the settlement. She could not grant the interest by anticipation, nor could she authorize the loan to her husband without her consent in writing, and upon a security by bond. No act of hers, unless according to the terms of the settlement, could, therefore bind her. Those terms are to be considered as prescribed in order to protect her against the influence of her husband. The trust fund must, therefore, be replaced. If the husband should survive the wife, the trustees will be entitled to the benefit of his life interest.[1]

(*a*) 1 Mer. 712. (*b*) 3 Swanst. 80, n.

[1] Where on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins* v. *Myall*, 2 Russ & M. 86. A sum in consols was bequeathed to A. B. a feme covert, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in trust of the executors, till the youngest of her children attained twenty-one, when

[*539] *The assignees of the husband were not made parties to the suit, but appeared by counsel at the hearing, and consented to be bound by the judgment of the court.(a)

Champion v. Rigby.[1]

Rolls.—1830; May 20.

A solicitor, who purchases from his client, is bound to prove that he paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person.

After a delay of eighteen years, a bill filed by a client against his solicitor to avoid a purchase, was dismissed.

The bill was filed to set aside a sale of property, made, it was alleged, at a great under-value to the defendant, who at the time was the confidential solicitor of the plaintiff, and when the plaintiff, to the knowledge of the defendant, was in embarrassed circumstances.

The transaction complained of took place eighteen years before the bill was filed, and the delay on the part of the plaintiff was not satisfactorily accounted for.

Mr. *Bickersteth* and Mr. *Younge*, for the plaintiff.

Mr. *Tinney*, Mr. *Pemberton*, and Mr. *Spence*, for the defendant.

The Master of the Rolls dismissed the bill on the ground of the delay,[2] but stated that a solicitor, who purchased from his client, was bound

the principal was to be her own; or in case of her demise it was to devolve to her husband. The trustees on the death of the testatrix transferred the fund to A. B.; she and her husband afterwards sold it out, and they both signed the transfer: it was held that a breach of trust had been committed, but that A. B. had made a valid disposition of the dividends which might accrue previous to her youngest child, born after the death of the testatrix, attaining twenty-one. The Master of the Rolls, Lord Langdale, observed: "It is very distressing to find claims made against a party entirely innocent, by one who has been the occasion of the breach of trust complained of. It is, no doubt, a case of great hardship, but the court must act strictly on its established principles." *Crosby* v. *Church*, 3 Beav. 485; and see *Holford* v. *Phipps*, id. 440. Stock was settled on a wife, for her separate use for life, with a power of appointment by will. The trustees at the request of the husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having by her will, appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees, and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had: but, as he had received the proceeds of the stock sold out, his bill was dismissed. "It would be contrary to plain justice, that he who has had the money once, should have it a second time." *Nail* v. *Punter*, 5 Sim. 555.

(a) See *Capel* v. *Butler*, 2 Sim. & Stu. 457. *Bozon* v. *Bolland*, supra, p. 69. *White* v. *Hall*, supra, p. 332.

[1] Affirmed by Lord Cottenham in 1840. See 3 Beav. 58, n.

[2] A bill to set aside a purchase by a trustee for himself and his children, was, after a lapse of

to prove that he had paid that price for the property which, in the exercise of his professional duty, he would have advised his client to accept from a third person; and not being satisfied that this had been the case with the defendant, he dismissed the bill without costs.[1]

eighteen years, dismissed upon the length of time only. *Gregory* v. *Gregory*, Cooper's Rep. 201. As to the objection of staleness of demand, see further, *Mooers* v. *White*, 6 Johns. Ch. Rep. 360. 2 Keen, 749, n. 1. *Searle* v. *Colt*, 1 Yo. & Coll. C. C 36, 51. *Neesom* v. *Clarkson*, 2 Hare, 174, 175. *Philips* v. *Belden*, 2 Edw. Ch. Rep. 1. *Fish* v. *Miller*, 1 Hoff. Ch. Rep. 286. Am. Ch. Dig.; Length of Time, I, IV; Limitations, Statute of, VII.

[1] On the question of the propriety of a purchase by a solicitor from his client, the solicitor in order to sustain the transaction, must, if he was solicitor *in hac re* show that he gave his client all that reasonable advice against himself, which his office of solicitor would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative situation of the parties, and the equality of the footing upon which they stand, in reference to the subject of the contract; and although the relationship of attorney and client may exist, yet if it has no existence *in hac re*, the rule with regard to the *onus* of proof may be no longer applicable. And it appearing by the evidence, although it was not stated on the pleadings, that the value of the minerals in an estate purchased by the solicitor from his client was considerably increased after the purchase, owing to a railroad then contemplated having been afterwards formed through the immediate neighborhood; this was, it seems, a merely speculative advantage, the communication of which to his client, the solicitor would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it; and the purchase was sustained under the circumstances, though part of the consideration was made up of costs. The following is an extract from the very able opinion, in this case, of the Vice-Chancellor, Sir James Wigram. "It was not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not, in that case, the positive incapacity which exists between a trustee and *cestui que trust;* but the rule the court imposes is, —that inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client,—the *onus* lies on the solicitor to prove that the transaction was fair. *Montesquieu* v. *Sandys*, 18 Ves. 302. *Cane* v. *Lord Allen*, 2 Dow. 289. The rule is expressed by Lord Eldon (6 Ves. 278,) to be, that if the attorney "will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given him against a third person." It was argued that the rule I have referred to has no application, unless the defendant was the plaintiff's solicitor *in hac re*, and this argument is no doubt well founded. *Jones* v. *Thomas*, 2 Yo. & Coll. 498. *Gibson* v. *Jeyes*, 6 Ves. 266, 278. It appears to me, however, that the question whether Meyrick was the solicitor *in hac re*, is one rather of words than of substance. The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand. In some cases, as between trustee and *cestui que trust*, the rule goes to the extent of creating a positive incapacity; the duties of the office of trustee requiring, on general principles, that that particular case should be so guarded. The case of solicitor and client is, however, different. In the case of *Gibson* v. *Jeyes*, there was evidence that the client was of advanced age, and of much infirmity both in mind and body, that the consideration was inadequate—and of various other circumstances. Lord Eldon there shows how each of those circumstances gave rise to its appropriate duty on the part of the attorney. In other cases where an attorney has been employed to manage an estate, he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his own advantage. *Cone* v. *Lord Allen*, 2 Dow. 294. But as the communication of such knowledge by the attorney will place the parties upon an equality,—when it is

[*540] *ESDAILE v. GALL.

ROLLS.—1830; May 22.

A testator devised in the following words:—"As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and after her decease, that in St. John's Lane to my daughter; the other between my two sons, to be equally divided;" Held, that the daughter took only an estate for life, in the house in St. John's Lane.

THE bill was filed by a vendor to enforce the specific performance of a contract to purchase a house in St. John's Lane. The defence was, that a good title was not shown.

The title of the vendor arose under the will of John Mayer, dated 1735, which contained a devise in the following words:—"As to the rest of my estate, the two houses in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my loving wife Mary Mayer, for life, and after her decease, that in St. John's Lane to my daughter Mary Mayer, the other between my two sons John and Joseph Mayer, to be equally divided; as to the rest of my estate, of what nature soever, one-third to my wife, and the rest to be divided equally among the three children."

The title of the vendor was derived from Mary Mayer, the daughter; and the question in the cause was, whether the interest, which she took under her

proved that the communication was made, the difficulty of supporting the transaction is *quoad hoc* removed. If, on the other hand, the attorney has not had any concern with the estate respecting which the question arises, the particular duties to which any given situation of confidence might give rise cannot of course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult,—and without the clearest evidence that no advantage was taken by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment,—it would be impossible to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendency, placing the client in circumstances of disadvantage; as where he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties, in such a case, must at least impose upon the attorney the duty of giving the full value for the estate, and the *onus* of proving that he did so. If he proves the full value to have been given, the ground for any unfavorable inference is removed. The cases may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exists in one transaction, and, therefore personal influence or ascendency may operate in another, yet the relation not existing *in hac re*, the rule of equity to which I am now adverting may no longer apply. The nature of the proof, therefore, which the court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendency or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arms length and on an equal footing: this seems deducible from the cases." *Edwards* v. *Meyrick*, 2 Hare, 60. As to the general rule by which a trustee, executor, &c. is incapacitated from becoming a purchaser of the trust property; See *Hawley* v. *Cramer*, 4 Cowen, 717. *Case* v. *Abeel*, 1 Paige, 393. *Stiles* v. *Burch*, 5 Paige, 134. *Van Epps* v. *Van Epps*, 9 Paige, 237. *Carter* v. *Palmer*, 1 Dru. & Walsh, 744. 4 Kent's Comm. 438. 2 Keen, 731, n. 1.

father's will in the house in St. John's Lane, was a fee simple absolute, or only an estate for life?

The master was of opinion that she took only an estate for life, and reported against the title; and the question now came before the court on an exception to the report.

Mr. *Treslove* and Mr. *J. Martin*, for the exception, contended that the word *estate* was so applied to the subject of the devise as to give the devisee a fee, though *no words of limitation were used; the more [*541] so, because the testator, when he did not mean to give the fee, as in the devise to the wife, limited her interest expressly by the words "for life;" and they cited *Denn* v. *Hood*,(a) *Ibbetson* v. *Beckwith*,(b) and *Wilkinson* v. *Chapman*.(c)

Mr. *Bickersteth* and Mr. *Stuart*, for the defendant.

THE MASTER OF THE ROLLS held, that Mary Mayer did not take the fee simple under her father's will, and overruled the exception.[1]

CRITCHETT v. TAYNTON.

ROLLS.—1830; May 22, 24.

A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over, in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different intent appeared from the subsequent part of the will.

The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage.

THE testator John Hughes, after giving some legacies and devising a real estate to his son in law John Billingsley in fee, disposed of the residue of his property in the following words:—"All the rest, residue, and remainder of my estates, both real and personal, of what nature or kind soever, I give and devise unto Hugh Valence Jones, of St. Alban's street, in the county of Middlesex, and unto Peter Waldo, of Mitcham, in the county of Surrey, Esquires, and the survivor of them, their heirs, executors, administrators,

(a) 7 Taunt. 35. (b) Cas. Temp. Talb. 157. (c) 3 Russ. 145.

[1] As to what words in a will, will pass real estate, see *Thomas* v. *Phelps*, 4 Russ. 348. *Jackson* v. *Babcock*, 12 Johns. Rep. 341. *Jackson* v. *Housel*, 17 Johns. Rep. 281. *Bradstreet* v. *Clark*, 12 Wend. 602. *Spry* v. *Bromfield*, 9 Sim. 534. *Dover* v. *Gregory*, 10 Sim. 393. *Fraser* v. *Hamilton*, 2 Desau. 578. *Goodrich* v. *Harding*, 3 Randolph, (Va.) Rep. 280. *Shermer* v. *Shermer*, 1 Wash. 343. By the Revised Statutes of New York, vol. 1, (2d. ed.) p. 739, § 1, an estate in fee passes either by grant or devise, without words of inheritance, unless there is an express or implied intention to the contrary.

and assigns, in trust to pay and apply the rents, interest, dividends,
[*542] and proceeds thereof, unto my daughter Sarah Billingsley *for and during the term of her natural life, for her sole and separate use and benefit, and so as the same shall not be subject or liable to the debts, contracts, or engagements of her said husband; and receipts signed by my said daughter only shall at all times be a sufficient discharge for the same; and my will and meaning is, that the receipts of no other person or persons whatsoever, during the life of my said daughter, but those signed by her proper hand only, shall be a discharge for the said rents and proceeds of my real and personal estate. And from and after the decease of my said daughter, I give and bequeath all my personal estate, of what nature or kind soever, unto my next of kin, who as such would be entitled thereunto under the statute of distribution. And I also give and devise, from and after the decease of my said daughter, all the rest, residue and remainder of my real estates, of what nature or kind soever, unto her third, fourth, and every younger child or children, share and share alike, as tenants in common; but in case my said daughter should die leaving no issue behind her, or if my said daughter's second, third, fourth, and every other child does not attain his, her, or their respective age or ages of twenty-one years, and not married before such age with the consent of my son and daughter, and the survivor of them, I give and devise my estate in the parish of Lerkhampton, in the said county of Gloucester, now in the possession of William Rose, and fifty acres of land, be the same more or less, adjoining part of the said estate, which I bought of Thomas White, unto my sister Elizabeth Gregory, and her heirs for ever; and I also give and devise all the rest, residue, and remainder of my real estates, of what nature or kind soever, in the parish of Cheltenham aforesaid, unto my sister Mary Marsham and her heirs for ever. And that no misconstruction may be put upon the word *consent*, my will and
[*543] meaning is, that my said son and daughter, or *the survivor of them, shall be subscribing witnesses or witness at the wedding of such child or children that shall so marry before his, her, or their respective age or ages of twenty-one years, otherwise such child or children shall not have or receive any benefit from this my will."

The testator's daughter Sarah, at the making of the will, and at the death of the testator, was the wife of John Billingsley, by whom she had five children; and after his death she intermarried with the defendant Richard Critchett, by whom she had ten children. Two of the children by the first husband, and five of the children by the second husband, died in the lifetime of their mother under the age of twenty-one years, and unmarried; and no child married under the age of twenty-one years.

Two questions were made in the cause; first, whether the children of the second marriage were entitled equally under the will with the children of the first marriage; secondly, whether the children, who died under twenty-one, and unmarried, took vested interests.

Mr. *Jemmet*, for the plaintiffs.

Mr. *Bickersteth*, Mr. *Hayter*, Mr. *Purvis*, and Mr. *Lynch*, for different defendants.

On the first point it was argued, on behalf of the children of the second marriage, that the words " her second, third, fourth, and every younger child or children," included all her children, whether by her first or by any subsequent husband; and *Barrington* v. *Tristram*,(*a*) was cited.

*On the other hand, it was said that the question was simply as to [*544] the intention of the testator; and it was manifest from the language of the will that he had not any children in contemplation, except children of his daughter by her then husband Mr. Billingsley. The children included within the devise must be the same with those, upon the death of whom under twenty-one, and unmarried, the limitations over were to take effect. Now they were children, who, if they married under twenty-one, were to marry with the consent of " my son and daughter, or the survivor of them;" and the testator further requires " my said son and daughter, or the survivor of them, to be subscribing witnesses or witness to the wedding." In these phrases the word *son* necessarily refers to Mr. Billingsley; and the devise must, therefore, be confined to the children of the daughter by Mr. Billingsley.

On the second point it was argued, on the one side, that the devise of the residue of the testator's real estates, after his daughter's death, to her second and other younger children, gave them vested interests; that there was no gift over, except in the event of all these children dying under the age of twenty-one and unmarried; that that event had not happened, for some of them had attained twenty-one; and, therefore, that the interest which vested in them was never devested. *Skey* v. *Barnes*.(*b*) The clauses, which related to the marriage of the younger children under twenty-one, and to their death under twenty-one without having been married with the required consent, were, at the utmost, equivalent only to directions, that the shares should not be transferred to the children respectively, until they attained twenty-one or married with the consent of both parents *or the survi- [*545] vor duly given; and it is settled that, where there is an antecedent gift, a direction not to pay or transfer the property to the legatee or devisee till he attains a particular age, or till a particular event happens, will not postpone the vesting. *Leake* v. *Robinson*.(*c*)

On the contrary, it was contended, on behalf of the surviving children, that it was apparent on the whole context of the will, that a child was not to participate in the devise, till marriage under twenty-one without due consent was impossible, in other words, till the child had either married with consent or attained twenty-one; and this intention could not be affected, unless the vesting of the shares was postponed.

(*a*) 6 Ves. 345. (*b*) 3 Mer. 335. (*c*) 2 Mer. 363.

May 24.—THE MASTER OF THE ROLLS :—As to the first point, the testator certainly had not in his contemplation a second marriage of his daughter; but still his plain purpose being to provide for all the children of his daughter, and the limitation over being "in case his daughter should die leaving no issue behind her," I am of opinion that the gift in the will must be construed to extend to children of the second marriage.

With respect to the second point, the children would plainly take an immediate vested interest by the expression of the gift to them as tenants in common, if a different intention did not appear from the subsequent parts of the will. The testator proceeds to make a gift over, in case all the children should die under twenty-one, and not married under that age with [*546] the consent of *his son and daughter; and he afterwards adds, "my will and meaning is, that my said son and daughter, or the survivor of them, shall be subscribing witnesses or witness at the wedding of such child or children that shall so marry before his, her, or their respective age or ages of twenty-one years, otherwise such child or children shall not receive any benefit from the will." It necessarily follows, that such child would not take a previous vested interest, because, from such interest, the child would be entitled to maintenance, and would take a benefit under the will.[1] And if a consent is necessary to give a vested interest to a child marrying under twenty-one, it is clear that the testator did not intend that the children should take a vested interest by the first gift to them as tenants in common; and the attaining twenty-one must be as necessary to give them a vested interest, as the marriage with consent under that age. I am of opinion, therefore, that the younger children, who attained twenty-one, take the real estates equally between them as tenants in common.[2]

[*547] *EARLE *v.* PICKIN.

ROLLS.—1830; May 24. L. C.—1831; July 25, August 6.

Where the question in the cause turned upon the fact of notice of a settlement, and the names of the witnesses, and the particular facts of notice were not stated in the bill, so that the defendant had no opportunity to meet their testimony, an inquiry as to the fact of notice was directed before the master.

On appeal the decree was varied by directing an issue to try whether the circumstances relied upon to prove the notice took place prior to a stated day, after which notice would be immaterial.

Whether the court will, under special circumstances, direct witnesses examined in the cause, to be examined to the same points before the master, *quere*.

THE bill was filed by children who claimed to be entitled to a sum of 2000*l.* charged upon a real estate by the marriage settlement of their father.

[1] Vide *Mills* v. *Roberts*, post, 555.

[2] Vide *Adams* v. *Beekman*, 1 Paige, 631. *Hoxie* v. *Hoxie*, 7 Paige, 187. *Ellis* v. *Maxwell*, 3 Beav. 587. *Leeming* v. *Sherratt*, 2 Hare, 14. *Drake* v. *Pell*, 3 Edw. Ch. Rep. 251. *Torrey* v. *Shaw*, id. 360.

The defendant was the purchaser of the estate from the father; and the only question in the cause was, whether, at the time of the purchase and payment of the price, which took place on the 29th of September, 1818, the defendant had notice of the settlement.

The bill alleged that the defendant had notice of the charge before he completed his purchase. Two witnesses of the names of Bishton and Wright swore that he had admitted, that he had had notice; and one of them deposed to a conversation with him, which amounted to notice, and from which it appeared, that before making the purchase, the defendant had consulted a Mr. Smith, a solicitor, on the subject of a supposed charge on the estate.

Mr. *Pemberton* and Mr. *Wakefield*, for the plaintiffs, argued, that on this evidence they were entitled to a decree.

Mr. *Bickersteth* and Mr. *Rolfe*, contra:—The defendant ought not to be concluded by evidence, which it was impossible for him to meet. He could not prove a general negative, that he never had *notice; and he [*548] had no information concerning the particular facts of notice on which the plaintiffs meant to rely. The bill ought to have stated those particular facts and the defendant would then have been prepared to disprove them. If, for instance, the conversation, to which one of the witnesses deposes, had been stated in the bill, the defendant could have shown, as the fact really was, that the conversation took place, not before, but after the completion of the purchase. As to the defendant's admissions of having notice, which the witnesses had proved, the rule of pleading was, that a party could not rely on an admission made by his adversary, not appearing in the pleadings, unless it were put in issue, so that he, whom it was sought to bind by it, might either disprove it or explain it. In the present case, as the bill made no mention of any particular facts of notice, or of the alleged admissions of notice, an inquiry ought to be directed, so as to give the defendant an opportunity of meeting a case which had been opened against him by surprise.

Mr. *Pemberton*, in reply, denied that any such rules of pleading existed, as those on which the argument for the defendant was founded; and contended, that to direct an inquiry in the present stage of the proceeding, would be to throw, undeservedly, discredit on the witnesses who had been examined, and to hold out to a defendant great opportunities and temptation to tamper with evidence.

The Master of the Rolls, after some hesitation, made the following order:—"It appearing that neither the names of the witnesses who have deposed to the notice, nor the particular facts of notice were stated in the bill, refer it to the master to inquire, whether, at or before the time the purchase was completed, the *defendant had notice of the settlement [*549] by which the charge of 2000*l.* was created, with liberty to the master to state any circumstances specially at the request of either party."

The Master of the Rolls stated, that he made the order in this spe-

cial form, lest he should appear to throw discredit upon the witnesses by directing the inquiry.

1831; *July* 25.—The plaintiffs appealed from his honor's decree.

The *Solicitor General* (Sir *W. Horne*) and Mr. *Wakefield*, for the appellants, contended that the evidence, if believed, (and no attempt had been made to discredit it,) fully established the case by the bill. The fact of notice, upon which the whole question turned, was distinctly put in issue, and was satisfactorily proved by the evidence of several witnesses, swearing to conversations which took place with the defendant anterior to the date of his purchase, and from which his knowledge of the charge on the estate, and of the consequent defect in the title, was clearly to be collected.

The judgment of the court below proceeded, in part, upon the ground, that the bill did not state the names of the individuals by whose testimony the fact of notice was to be proved; but the doctrine of his honor in that respect was supported by no authority, and, if adopted, might lead to great mischief, by holding out to defendants the temptation and opportunity to tamper with their adversaries' witnesses. For that very reason, indeed, the court had laid down a rule which would render the inquiry directed by this decree
*[550] entirely nugatory: for it was settled in practice, that the same *witnesses, who had been examined in the cause, could not be again examined to the same points before the master; and how, then, could the plaintiffs establish their case?

Sir *E. Sugden* and Mr. *Rolfe* for the defendant.

The Lord Chancellor:—The evidence contained in the depositions would certainly, if believed in its fullest extent, dispose of the whole case, not only as to the substance of the transactions, but as to the time when they are alleged to have taken place. The only question is, whether there is not some error with respect to the date; and I have a vehement suspicion that there is such an error; not so much in consequence of false swearing, however, which is hardly to be apprehended, as of mistake, which, upon comparing the facts stated in the answer with the depositions, appears very possible; and that possibility fully justified his honor in sending the matter to be further inquired into.

It was asked why the defendant did not produce Smith as a witness, inasmuch as his evidence would have been material to rebut the alleged notice, and the conversation might be the same to which Bishton and Wright, in their depositions, refer. But the answer is obvious. It might be perfectly true that this conversation took place in 1820; but that did not prove that notice was not given in 1818; and no man in his senses would attempt to rebut evidence of the nature of which he had no knowledge; no man would ever dream of calling Smith as a witness, to prove that which might be perfectly true, but which could not be rationally supposed to be in the least de-
[*551] gree material. The moment the *defendant is apprised, however

that evidence has been given of a conversation alleged to have taken place in 1818, and that Smith was referred to in that conversation, the case is altered; and it becomes most important to settle the date of the conversation, as the whole then turns upon whether it took place before or after the year 1818. If Smith comes forward to say he was consulted in 1820, but never before that time, there is at once an end of the plaintiff's case. If he says the contrary, there is an end of the defendant's. Shall I, then, by reversing the decree which directs these inquiries to be made, shut out the light which will be decisive of the merits on both sides?

His honor sent it to the master in preference to directing an issue; and I incline to think he was right in so doing, because a court of law would of necessity be confined to legal notice, to which only a jury could look. If any issue were to be directed, it should be to ascertain what was the date of the conversations.

I shall therefore send it to the master, with a direction that he shall be at liberty to examine the witnesses already examined, and to the same points;[1] a course which will not affect the question of costs, since, looking to the circumstances of the case, even if I affirmed the decree *totidem verbis*, I should affirm it without costs.

The cause was afterwards brought on again upon a motion to vary the minutes, by striking out the direction in the decree, that the witnesses, examined in the cause might be examined to the same points before the master,

[1] A witness examined in chief cannot be examined before the master without an order for the purpose. *Remsen* v. *Remsen*, 2 Johns. Ch. Rep. 501. 1 Barb. Ch. Pract. 497. In a creditor's suit, a witness called by the plaintiff, and cross-examined by the defendant, before the hearing, on a point not then in issue in the cause, was allowed to be re-examined by the defendant on the same issue, when raised before the master under the decree. Wigram, V. C observes: "The rule which prohibits the re-examination of a witness after decree, to the same matter to which he was examined before the decree, does not apply where the witness was called after the hearing, not by the same party who examined him before the hearing, but by the opposite party. *Metford* v. *Peters*, 8 Sim. 630. In this case the witness was called by the plaintiffs, and was cross-examined by the defendants. The point to which he was cross-examined, namely, the supposed usurious consideration for the bonds, was not pleaded, and could not therefore be the subject of discussion or consideration at the hearing; but the evidence in chief and cross-examination together were entered in the decree without objection. Under the decree, the practice of the court allows the defendant to make a new and distinct case before the master, a practice which, though very intelligible as regards persons who had no opportunity of combating the plaintiff's claim before the hearing, (*Owner* v. *Dickenson*, Cr. & Ph. 48,) is by no means satisfactory to my mind, as regards a defendant who, as in this case, had then the opportunity of resisting the plaintiffs right to a decree, if he had grounds for doing so. The result however is, that the defendants have raised in the master's office an issue not raised before; and the question is, whether I can refuse them, under proper safeguards, an opportunity of examining an important witness, only because they irregularly cross-examined the plaintiff's witness in a stage of the cause where there was no issue to which the evidence given upon the cross-examination was applicable?—The question then is under what restrictions, &c." *Whitaker* v. *Wright*, 2 Hare, 310, 323.

and substituting a direction for the trial of an issue to ascertain the date of the conversations.

[*552] *Mr. *Wakefield*, for the motion, insisted that the direction in the decree, with respect to the examination of the witnesses, was a violation of the settled principles and practice of the court, and would be pregnant with consequences most dangerous to justice. In support of these positions he referred to the following cases: *Browning* v. *Barton*,(a) *Sawyer* v. *Bowyer*,(b) *Vaughan* v. *Lloyd*,(c) *Smith* v. *Althus*,(d) *Birch* v. *Walker*,(e) *Willan* v. *Willan*,(g) *Smith* v. *Graham*.(h)

Mr. *Rolfe* opposed the application.

THE LORD CHANCELLOR ultimately ordered that the decree should be varied, by directing the parties to proceed to a trial at law upon the following issue —whether the conversations in the depositions mentioned, between the defendant and the witness Bishton, and between the defendant and the witness Wright, took place before the 29th day of September, 1818, with liberty to endorse special matter.[1]

Reg. Lib. A. 3095.

[*553] *TILSON *v.* JONES. TILSON *v.* THORNTON.

ROLLS.—1830; May 26.

Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context.

THE testatrix, Catharine Tilson, in her will gave as follows:—"I direct the interest of 131*l.* 5*s.* four per cent. bank annuities, and 40*l.* three and a half per cent. bank annuities, now standing in my name in the books of the governor and company of the bank of England, and the interest of my one hundred pounds' share in the Coventry Canal, to be equally divided between my son John Samuel Tilson and my daughter Catharine Tilson, exclusive of any husband with whom she may happen to intermarry, and without being subject to his debts; and in case of the death of either of them my said son and daughter, then I give the whole of my interest to the survivor of them; and if my son John Samuel Tilson shall not be in England at the time of my decease, then the execution of the trusts, so far only as they relate to him, shall be postponed until after his return; but in case of his death, then the said John Jones shall pay the whole of such interest to my daughter

[1] Vide *Whitaker* v. *Wright*, 2 Hare, 324.

(a) 1 Dick. 508. (b) 2 Dick. 639. 1 Bro. C. C. 388. (c) 1 Cox, 312.
(d) 11 Ves. 564. (e) 2 Sch. & L. 518. (g) Coop. 291. 19 Ves. 590.
(h) 2 Swan. 264, where these and some other cases upon the subject are collected. See also *Swinford* v. *Horne*, 5 Mad. 379.

Catharine Tilson; and in case of her death, I give the whole of such principal and interest to be equally divided between my niece Ann Fitzpatrick Thornton and my nephew Alfred Barnes; and in case of their death before my son John Samuel Tilson and my daughter Catharine Tilson, then I give the whole thereof, principal and interest, at the deaths of John Samuel Tilson and Catharine Tilson, to my god daughter Catharine Mary Jones, daughter of my executor John Jones."

*Catharine Tilson survived her brother, and the question in the cause was, whether she took the stock and canal share absolutely or only for life? [*554]

Mr. *Bickersteth* contended that the testatrix had given only the interest, and not the corpus of the property, to her son and daughter; that they, as between themselves, had the benefit of survivorship; that, after the death of both, the intention of the testatrix was, that the fund should go to the persons whom she had marked out; and, therefore, that Catharine Tilson took only a life interest in this property.

Mr. *Pemberton*, contra, argued that a gift of the interest is sufficient to carry the principal; that the words "in case of her death," referred more properly to a contingent than to a certain event, that is, to the death of the daughter in the lifetime of the testatrix, which might or might not happen, rather than to the death of the daughter at any time, which could not but happen; and, therefore, that, as Catharine Tilson survived her brother, she took the property absolutely, and there was a failure of all the limitations after the gift to her.

The Master of the Rolls:—The gift over is in the first place to the testatrix's niece Ann Fitzpatrick Thornton, and her nephew Alfred Barns; and in case of their deaths before her son and daughter, then to her god daughter Catharine Mary Jones. The testatrix must be understood here as if she had expressed herself thus: "I give the principal and interest to Ann Fitzpatrick Thornton and Alfred Barns, if they shall survive my son and daughter; and if they shall not survive them, then to Catharine Mary Jones." She could not refer here to the death of her son and *daughter in her lifetime; Catharine Tilson, therefore, takes for life only. [*555]

Besides this, the testatrix, in her gift to her son and daughter, speaks of the interest only; but in the gift over she speaks of the principal and interest.

Mills v. Robarts.

Rolls.—1830; May 26.

Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age.

George James Robarts by his last will, after bequeathing a legacy to Mary Ann Harben, and giving to Charles Mills and Abraham Wildey Robarts a sum of 8000*l.* in trust, to pay to her the interest during her life, referred to a settlement which he had previously made of 10,000*l.* three per cent. consolidated bank annuities for the benefit of Mary Ann Harben during her life, and then proceeded in the following words:—

"I do will and bequeath this said sum of 10,000*l.* three per cent. consols, after the decease of Mary Ann Harben, to be equally divided between her two children hereafter named: viz. Georgiana Charlotte Harben Robarts, and her infant brother not yet baptized, but whom I purpose to name, James George Harben Robarts, for their joint use and benefit for ever. In the event of the said children dying before they attain the age of twenty-one years, I then will and bequeath the said 10,000*l.* three per cent. consols to the survivor; or in case they both die before they attain the age of twenty-one years, I then will and bequeath the said 10,000*l.* three per cent. consols to my nephew Harry Robarts and his heirs for ever. In like manner I will and bequeath to my two children, Georgiana Charlotte Harben Robarts and James George Harben Robarts, after the decease of their mo-
[*556] ther *Mary Ann Harben, in equal proportions, the sum of 8000*l.* before named in this my will and testament, subject to the same provision as is directed in the above paragraph; viz. in the event of the said children dying before they attain twenty-one years of age, I then will and bequeath the said sum of 8000*l.* to my nephew Harry Robarts and his heirs for ever." "I will and bequeath," continued the testator in a subsequent part of his will, "to my daughter Georgiana Charlotte Harben Robarts, daughter also of the above named Mary Ann Harben, the sum of 10,000*l.* sterling, for her own absolute use and benefit, provided she attains the age of twenty-one years; in default of this, I will and bequeath the said 10,000*l.* sterling, to her brother James George Harben Robarts, provided also he attains the age of twenty-one years, but in default of this, I will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I will and bequeath to James George Harben Robarts the sum of 10,000*l.* sterling, for his own absolute use and benefit, provided he attains the age of twenty-one years; but in default thereof, I will and bequeath the said 10,000*l.* sterling, to his sister Georgiana Charlotte Harben Robarts; but in the event of one or both of them dying before they attain the age of twen-

ty-one years, I then will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I will and bequeath that the legacy duty on the legacies bequeathed to Georgiana Charlotte Harben Robarts, and James George Harben Robarts, be paid by my executors out of the residue of my property. I will and bequeath to George Francis Stuart the sum of 10,000*l.* sterling, for his sole use and absolute disposal, provided he attains the age of twenty-one years; but in default thereof, I then will and bequeath the said 10,000*l.* to my nephew Harry Robarts and his heirs for ever. I constitute and appoint my brother Abraham Wildey Robarts, and my much esteemed friend Charles Mills, junior, of Birchin *Lane, trus- [*557] tees and guardians to the several persons before named in this my last will and testament: and I earnestly implore and request that they would have the goodness to act, and to attend particularly to the education and well being of Georgiana Charlotte Harben Robarts, and see that she is properly and virtuously brought up and educated; and I further will and direct that the said Georgiana Charlotte Harben Robarts is on no account to dispose of herself in marriage without the previous consent of her guardians, either before or after she attains twenty-one years of age, on pain of forfeiting two-thirds of the value of the legacies bequeathed to her in this my will. I earnestly recommend the said Georgiana Charlotte Harben Robarts and her brother to the favorable notice of my mother, sisters, and family in general; and I hope and trust, they will have some feeling consideration for the circumstances of their birth, and to do all in their power to make them respectable and happy in life." The testator concluded his will by bequeathing the residue of his property to his brothers and sisters, and appointing Charles Mills and Abraham Wildey Robarts his executors.

The bill was filed by one of the executors; and the question in the cause was, whether, the two children, Georgiana Charlotte Harben Robarts and James George Harben Robarts, were entitled to interest on their legacies of 10,000*l.* each for their maintenance and education during their minorities

Mr. *J. Russell*, for the plaintiff.

Mr. *Pemberton* and Mr. *Roots*, for the children of Mary Anne Harben: Though the legacies are given to the children, only provided they respectively attain the age of twenty one, *the testator has placed him- [*558] self in *loco parentis* towards these children, and they are entitled to the interest of the money for their support and maintenance. *Incledon* v. *Northcote*,(*a*) *Acherly* v. *Vernon*.(*b*) These two children have no immediate provision, except the legacies in question. What, then, did the testator mean by appointing Mr. Robarts and Mr. Mills trustees and guardians to them, and requesting those gentlemen to take care of their education? They could be trustees only of the legacies, and it was only out of the interest of the legacies that the expense of the education of the legatees could be de-

(*a*) 3 Atk. 430, 438. (*b*) 1 P. Wms. 783.

frayed. The testator, therefore, must have meant to postpone the possession, and not the vesting of the legacies. *Branstrom* v. *Wilkinson*.(*a*)

Mr. *Tinney* and Mr. *Rolfe*, for the residuary legatees:—These legacies are expressly given only on condition that the legatees attain twenty-one; if they do not attain that age, there is no bequest to them, and all that was intended for them goes over to other persons. How, then, can they be entitled to any benefit from this bequest, until the annexed condition is fulfilled? In *Branstrom* v. *Wilkinson* the legacy was given, *when* the child attained twenty-one; and the father of the legatee was appointed trustee of the legacy during her minority. The word "when" is not so strong as the word "provided;" and, though in the present case trustees are appointed, yet the trust is not expressly referred to the legacies of 10,000*l*. The testator seems to have used the words "trustees" and "guardians" as synonymous. His object was to appoint guardians for these illegitimate children, who might superintend their education; that was a purpose which he [*559] could not legally effect *and it is difficult to conceive how the use of this vague term can control the clear unequivocal import of the words of direct bequest. The testator had made a large provision for the mother; and, upon her death, the principal, amounting to 18,000*l*. consols, was to go to the children. The children might, during their minority, become entitled to this property; and, therefore, the appointment of trustees was not superfluous.

The Master of the Rolls:—The testator appoints two gentlemen to be trustees and guardians of these children, and requests them to attend to their education; and the case of *Branstrom* v. *Wilkinson* is an authority directly in point, that they are entitled to the interest of the sums given to them until they attain twenty-one, or die under that age. The same principle applies to the legacy given to George Francis Stuart.[1]

[*560] *Cooper *v.* Reilly.

1830; March.

The court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury, before the hearing. Whether that allowance be assignable, *quere?*

The substance of the bill and answer are correctly stated by Mr. Simmons, in his report of this case before the Vice-Chancellor.(*b*)

(*a*) 7 Ves. 421. (*b*) 2 Sim. 560.

[1] Vide *Vawdry* v. *Geddes*, ante, 203, 208; *Ellis* v. *Maxwell*, 3 Beav. 587. The testator gave his estate to be equally divided between his children on their attaining twenty-one with a power of advancement "from their respective portions" of his estate: a child survived the testator, but died under twenty-one; it was held that he took a vested interest. *Vipian* v. *Mills*, 1 Beav.

The motion for a receiver, which his honor had refused, was now renewed before the Lord Chancellor.

The *Solicitor General* and Mr. *Pemberton*, for the motion.

Mr. *Bickersteth* and Mr. *G. L. Russell* for the defendants, Reilly and Sir T. E. Tomlins.

The application was supported on the one hand, and resisted on the other, upon grounds similar to those taken in the court below. The only additional authority referred to was *Palmer* v. *Vaughan.*(*a*)

March 24.—The Lord Chancellor:—The bill states, that Sir Thomas Tomlins held the situation of assistant parliamentary counsel at a salary of 500*l.* a year, and that he assigned that salary to trustees for the payment of certain debts; and, under these circumstances, the present application was made for the appointment of a receiver. The duties of this office (though, strictly speaking, it can hardly be called an *office,) are sim- [*561] ply to act as an assistant counsel to the lords of the treasury, who have latterly paid it by a fixed salary. That salary, however, may at any time be discontinued, and the remuneration may in future be made by fees. There is no permanent fund for the payment of it, but a sum is annually voted by parliament for law expenses, and out of that vote the allowance has been hitherto paid. No action could be maintained for the recovery of that allowance; nor could any legal proceeding be enforced against the lords of the treasury to compel them to pay it. Possibly, if a receiver were appointed, their lordships might refuse to pay it to him; and no remedy in such a case could be had against them. Under these circumstances, the appointment of a receiver is, I think, improper; and the motion must, therefore, be refused.

Rolls; May 4.—The answer having been replied to, some evidence was gone into, to the effect of proving that no attempt had been made, on the part of Reilly the trustee, to obtain payment of any part of the salary; and the cause was soon afterwards brought on to a hearing at the rolls.

Mr. *Pemberton* and Mr. *Girdlestone*, jun., for the plaintiff, contended, that the trustee had been guilty of wilful default, and had colluded with the other defendant, the grantor of the deed, in order to defeat the rights of the creditors. The depositions showed that he had never given notice of the assignment at the treasury, much less attempted to recover payment of any part of the salary which had of course been suffered to find its way into the pocket of Sir T. E. Tomlins. Such conduct, after Reilly had once undertaken and acted in the trusts, was sufficient to make him personally liable.

*The defence set up by the answer was, that this salary was not an [*562]

(*a*) 3 Swan. 173. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

315. As to gift to illegitimate children, see *Gardner* v. *Heyer*, 2 Paige, 11. *Bagley* v. *Mollard*, post, 581.

assignable interest; and reliance was placed upon the concurring judgments of the Vice-Chancellor and Lord Chancellor upon the motion. It did not follow, however, that because payment of the salary could not be enforced by an action, the assignment was, therefore, invalid, or that the transaction would not be binding at all events against Reilly. He certainly could not protect himself by saying, that if he had applied for the money, it would not have been paid: he was bound to execute the trusts to the best of his ability; and, if he declined to proceed himself, he must have allowed the *cestuis que trust* to use his name in any legal proceedings that might be instituted for the purpose of compelling payment.

Mr. *Bickersteth* and Mr. *S. P. White*, contra, submitted that it was an inevitable inference, from the opinions expressed by the Vice-Chancellor and Lord Lyndhurst with regard to the nature of the office and mode of remuneration, that Sir T. E. Tomlin's allowance was not capable of being legally assigned; and if that were the case, it was monstrous to seek to charge Reilly as a trustee, in respect of property which never had been or could be effectually vested in him.

The Master of the Rolls said, that before pronouncing an opinion with respect to the liability of Reilly, it would be necessary to determine the previous question, whether this was or was not an interest capable of being legally assigned,—a question which he considered to be one of doubt and difficulty; and he directed a case to be stated for the opinion of the court of common pleas upon that point.[1]

[1] The commissioners of customs by the direction of the lords of the treasury, granted to A., as a compensation for the loss of an office which he had held in the custom house 500*l.* a year, payable quarterly by the receiver general of customs. A. assigned the allowance to B. for a valuable consideration, and subsequently took the benefit of the insolvent debtor's act. The court in a suit by B. against A. and the assignees of his estate, but to which neither the lords of the treasury nor the commissioners of customs were parties, restrained the receiver general from paying over to the defendants moneys in his hands on account of the arrears of the allowance, unless the lords of the treasury, or the commissioners of customs should order the contrary. Shadwell V. C. said: "With regard to the sums in the hands of Sir W. Boothby (the receiver general,) I have to observe that this court has given effect to an assignment of even military full pay, with respect to money which was actually in the hands of the agent for the party who had made the assignment: for, in *Spencer* v. *Cox & Drummond*, (2 Anstr. 535, note,) an officer in the army had assigned his pay to the plaintiff to secure an annuity, and had given notice to the defendants, the agents of his regiment, to pay it over to the plaintiff. The officer being abroad on service, the plaintiff demanded payment of the arrears of the annuity from the defendants: and, on their refusing, he filed his bill. The defendants proved that officers in the army were at liberty to take up their pay from the regimental paymaster, and that the agent was answerable over to him. The Master of the Rolls, however, decreed that the defendants should pay the money in their hands, in discharge of the arrears of the annuity; and should discharge the growing payments of it, out of such moneys as they should receive on account of the assignor. But the Lord Chancellor varied the decree, by ordering the defendants to discharge the annuity out of what should remain in their hands after satisfying the demands of the paymaster: so that the court gave the assignee the benefit of his lien with respect to the balance of the moneys in the hands of the agents. In my opinion, Sir W. Boothby stands in the same situation, with respect to the sums in his hands which he has been directed to pay to the

1832; April.—No further proceedings have been taken in prosecution of the suit.

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*Ex parte Clarke. [*563]

1830; May 15.

An *ex parte* order of commitment for a contempt is not irregular, because it has been granted absolutely in the first instance, although the person guilty of the contempt is not a party in a cause.

The court will stay proceedings in an action against its officers, where the question to be tried is, how far they have conducted themselves with propriety in the execution of its orders.

Whether the court will make an *ex parte* order, that a person guilty of a contempt shall stand absolutely committed, upon the testimony of a single witness, *quære*.

This was an application which arose out of the following circumstances:—In the cause of *Hichens* v. *Congreve*, an order was made that Henry Clarke, one the defendants in the cause, should pay a sum of money into court. Henry Clarke failed to obey that order; and having subsequently stood out process of contempt, a commission of rebellion issued against him in the regular course. The commission was directed to three persons of the names of Hudson, English, and White, of whom the first was clerk to the plaintiff's solicitor, and the two others, clerks in the employ of the Arigna Mining Company. These commissioners having, as their affidavits stated, received information, which led them to believe that Henry Clarke was privately harbored by his brother Charles Clarke, who was himself a party in the cause, they proceeded to the residence of the latter, near Paddington, between ten and eleven o'clock in the evening of the 16th of July, last. On their arrival there they knocked at the door, and Hudson having, on some pretext, gained admittance, he was shown into a room above stairs, where a company of Mr. Charles Clarke's friends, and among the rest, his brother Joseph Clarke, who was a defendant in the cause, were then assembled. Upon entering the room, Hudson immediately inquired for Henry Clarke, and being told by Charles Clarke in reply, that he was not there, or in the house, and being himself unacquainted with the person of Henry Clarke he retired to consult with the other commissioners, who had remainded below in the street. After some *deliberation, it was [*564] agreed among them, that, as they did not feel satisfied of the truth of Charles Clarke's statement, and there seemed a probability that Henry Clarke might still be secreted in the house, it would be advisable to have

insolvent, as the defendants did, in the case which I have alluded to." *Tunstall* v. *Boothby*, 10 Sim. 542. And see *Greenfell* v. *Dean and Canons of Windsor*, 2 Beav. 544. 2 Story's Eq. § 1040. d. e. f. 2 Sim. 363, n. 1. As to the assignment of an expectancy, see *Meek* v. *Kettlewell*, 1 Hare, 475. *Varick* v. *Edwards*, 1 Hoff. Ch. Rep. 395. 2 Story' sEq. § 1040. b.

the premises searched. They accordingly returned soon after, and on the door being opened, insisted upon their right to go over and examined the house. Some resistance to their admission was at first made on the part of Charles Clarke and his brother Joseph who again assured the commissioners that Henry Clarke was not there, and protested against their entrance, at the same time calling the watch, and representing the proceeding as an attempt to break forcibly into the house. Hudson thereupon explained to the Clarkes, as well as to the watchmen and the crowd, whom the noise had collected, the nature of his errand, and he produced and read in their hearing the commission of rebellion as the authority under which he acted. No farther opposition was offered, and Hudson and English, assisted by two watchmen, went up stairs and examined the different rooms, without finding the object of their search. On their return to their companion below, Charles Clarke gave the whole party in charge to the watch, and demanded that they should be carried forthwith to the watch house, on the ground of their creating a disturbance and riot in his house. The commissioners quitely submitted, and were carried to the Mary-le-bone office, a distance of about a mile, where they were detained in custody. In less than an hour the matter was brought before the constable of the night, who on inquiring into the circumstances of the charge, dismissed the complaint, and set the parties at liberty. In the course af a few days Charles Clarke commenced an action against one of the commissioners for a trespass in forcibly entering his house; and on the 1st of August, under an *ex parte* order bearing date the [*565] *30th of July, and obtained from the Vice-Chancellor on the affidavits of the commissioners, he was himself apprehended and committed to the Fleet, for a contempt in resisting the commissioners in the execution of their duty.

On the 5th of August a motion was made before the Lord Chancellor, by Mr. Bligh, that the order for the commitment of Charles Clarke might be discharged, and that he might be set at liberty. On that occasion his Lordship expressed an opinion that upon the evidence before him, which was the same that had been before his honor on granting the order originally, the commissioners had acted wantonly and unadvisedly in searching the house at so late an hour, without having reasonable ground for believing that Henry Clarke was secreted there; and he directed that Charles Clarke should be released without payment of costs; at the same time observing, that even if his conduct had not been altogether proper, he had been sufficiently punished by six days' imprisonment. His Lordship, in delivering his opinion, took no notice of the order under which Clarke had been committed, and which therefore remained undischarged.

On the 4th of December, 1829, the Vice-Chancellor made an order that Charles Clarke might be restrained from commencing or prosecuting any legal proceedings against the commissioners in respect of the transactions

already detailed, without prejudice, however, to any application which either party might be advised to make.

Mr. *Bligh* now moved that the orders made by his honor, the Vice-Chancellor, on the 30th of July and the 4th of December last respectively, might be discharged.

*The order of the 30th of July, he contended, was wholly irregular. [*566] It was granted without notice, upon an *ex parte* application against a person who was no party to the suit. The cases in which the court had interfered most vigorously to vindicate its authority had never gone that length. Even where its officers had been personally attacked and maltreated, the course was to grant the order of commitment upon notice, or *nisi* only, in the first instance; *Williams* v. *Johns*,(*a*) *Morgan* v. *Jones*,(*b*) *Van* v. *Price*.(*c*) *Elliott* v. *Halmarack*(*d*) strongly confirmed the general rule; for although that was the case of a violent assault upon the messenger, Sir S. Romilly, in moving for the committal of the offenders, thought it necessary to ask specially that the order might be without notice, and yet Lord Eldon granted it only *nisi* against the defendants, and refused it altogether against the constable, who was not a party. That no aggravated contempt had been committed here, but that whatever blame there was, rested really on the other side, was proved by the fact that when the circumstances were more fully disclosed on the application of the 5th of August, the court had directed Charles Clarke to be set at liberty, and had censured the conduct of the commissioners. In proceeding against Clarke for a contempt, the commissioners had been actuated by a spirit of revenge, for they lay by and took no notice of the alleged contempt for nearly a fortnight; and it was not till one of their number had been served with the writ in trespass that they thought of complaining to the court.

Looking to the whole of the transactions as stated in the affidavits of the commisssioners themselves, as well *as in that of Mr. Clarke, [*567] it was clear that those officers had exceeded their duty, and had been guilty of a wanton outrage upon the peace of a private family. They never had even a probable reason for suspecting that Henry Clarke was concealed in his brother's house; and nothing but the strongest grounds for that belief could have justified them in forcing an entrance, especially at so late an hour, into the dwelling of one who was a stranger to the cause. Under these circumstances the court would not interpose to shield them from the penal consequences of their misconduct. Such protection had been sometimes granted where the officers had been free from blame, and had acted strictly according to their instructions, though from an informality in the warrant their proceedings had been technically illegal; *May* v. *Hook*,(*e*) *Frowd* v. *Lawrence*:(*g*) but there was no peremptory rule that the court must necessarily interpose wherever the conduct of its officers was concerned; still less where the ques-

(*a*) 1 Mer. 303, n. 2 Dick. 477. (*b*) 3 Atk. 219. (*c*) 1 Dick. 91.
(*d*) 1 Mer. 302. (*e*) 2 Dick. 619. 1 J. & W. 663, n. (*g*) 1 J. & W. 655.

tion to be tried was one turning entirely upon facts, which a jury was much better qualified to sift and pronounce upon, than a master proceeding upon affidavits. On the contrary, Lord Eldon in the case last referred to, where the irregularity was merely formal, manifested the utmost reluctance to break in upon the common law right of the subject to ask of a jury, how far he was entitled to damages for being deprived of his liberty. In *Ex parte Whitchurch*(*a*) Lord Hardwicke left the aggrieved party to pursue his legal remedy. Where was such interference to stop short? If a violent assault or a murder were committed, would the court grant an injunction against a criminal prosecution?

[*568] The *Solicitor General* and Mr. *Horne*, contra:—*The doctrine that no *ex parte* order of commitment for a contempt can be absolute in the first instance is directly at variance with authority. Many precedents of such orders might be produced where the contempt is of an aggravated kind, and accompanied, as this was, by an assault. Lord Bacon's and Lord Clarendon's orders,(*b*) Cary,(*c*) Harrison's Practice.(*d*) The court, no doubt, always exercises a discretion upon the subject, and to justify an *ex parte* order for an immediate commitment, will require a strong case. His honor was satisfied upon having the facts fully brought before him, and carefully examining the affidavits, that they justified him in making such an order here. In all the authorities referred to the contempt was merely passive, or there was a defect of evidence, the acts complained of being proved by a single witness only; an objection which does not arise now; although if it were necessary it might be shown by reference to the books of practice, that where the contempt is flagrant, and attended with circumstances of personal violence, the testimony of one witness is sufficient. The court of chancery, acting by its masters, is the fittest, and ought to be the sole judge of matters involving the duties and conduct of its servants, and the nature and extent of their authority. That principle originally laid down broadly in *Bailey* v. *Devereux*,(*e*) was followed in *May* v. *Hook*,(*g*) and confirmed rather than shaken by Lord Eldon's judgment in *Frowd* v. *Lawrence*.(*h*)

The Lord Chancellor:—I think the authorities cited with respect [*569] to the regularity of the commitment turn upon another point, *namely, that the orders were founded only on the testimony of one witness: here however, there are several. It is not peculiar to this court to commit a man for a contempt without his being heard. I see no reason, therefore, to depart from the Vice-Chancellor's decision; and I came to the same conclusion, namely, that this was a contempt for which the party might at once be committed, before my attention was drawn so pointedly to the technical question. The ground is, that, after the commission was exhibited to Mr.

(*a*) 1 Atk. 55.
(*b*) Beames' Ord. 34. 204, and n.
(*c*) p. 91.
(*d*) pp. 158, 159. Wy. Prac. Reg. 138.
(*e*) 1 Vern. 269.
(*g*) 1 J. & W. 663. n.
(*h*) 1 J. & W. 655.

Clarke, he assisted in taking to the watch house individuals armed with the authority of this court. I think that for that violence the Vice-Chancellor was justified in ordering him to stand committed; and that it makes no difference that the person guilty of the violence was not a party to the suit.

The other motion is, to discharge the order restraining the action of trespass. In that order is an insertion, that the injunction shall be without prejudice to any application which the party may make. Now at law a question may arise as to the extent of authority possessed by a person, armed with a commission of rebellion issuing out of this court, and there might be some difficulty in ascertaining that point before a jury. The great seal has always asserted its right in such cases. It was said that here the commissioners are mere volunteers, and not the regular officers of the court; but they are its officers *pro hac vice*, and, as such, entitled to its protection.

On the question whether Charles Clarke has been guilty of a contempt, it is impossible to entertain a doubt. Before the persons armed with the process of the court were seized and carried to the watch house, the commission was produced and read. What fell *from me on the former occasion, when I threw out an opinion that the parties entered into Clarke's dwelling house without reasonable cause, has been strongly pressed upon me; but the case upon the additional evidence, especially upon English's further affidavit, in which the grounds of his belief are disclosed, now wears a very different aspect. There is no appearance of violence, nothing but a mere entry. Undoubtedly this court has authority, when an action is brought against its officers, to interpose by injunction for their protection.[1] The subject was much considered by Lord Eldon in the case of *Frowd* v. *Lawrence*, where his Lordship decided that it was competent for the court to interfere; and *May* v. *Hook* is in conformity with the same doctrine. There do not appear to be any special facts, arising out of the conduct of the parties in this case, which should induce me to abstain from allowing the matter to take that course; and for the purpose, therefore, of transferring the question to the master, the injunction ought to be granted. [*570]

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*Welby v. Rockcliffe. [*571]

1830; June, 12, 15. L. C.

A testator devises lands to R. in fee, and reciting that he has executed a bond for the due payment of a certain annuity, he charges the lands so devised, and also the said R. his heirs, executors, and administrators, with the payment of that annuity; he then gives divers pecuniary legacies and directs the residue of his personal estate to be divided equally between R. and W.: Held, that the annuity is primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate.

Thomas Brown, by will duly executed and attested, after directing that

[1] Vide *Chalie* v. *Pickering*, 1 Keen, 749, 53 and n. ibid.

his just debts should be paid, devised all his messuages, cottages, closes, lands, &c. lying in the parish of Wilsford, unto Thomas Rockcliffe the younger, in fee; and he devised all his messuages, closes, and lands, lying in Willoughby, unto John Welby in fee. The will then recited that, by an obligation made on his marriage, the testator had bound himself, his heirs, executors, and administrators, in the penal sum of 4000*l.* in order to secure the payment of an annuity of 200*l.* to his wife, Leonora Brown, in the event of her surviving him, and proceeded in these words:—"Now I do hereby charge and make chargeable all and singular my said messuages, cottages, closes, lands, &c. in Wilsford aforesaid, and hereinbefore devised to the said Thomas Rockcliffe the younger, his heirs and assigns; and also the said Thomas Rockcliffe, his heirs, executors, administrators, and every of them, to and with the payment of the said annuity or yearly sum of 200*l.* in case the said Leonora Brown shall be living at the time of my decease." The will also bequeathed a number of pecuniary legacies to different persons, and gave all the rest and residue of the testator's personal estate and effects to Thomas Rockcliffe the younger, for his own use absolutely.

By a codicil the testator revoked the residuary bequest contained in his will, and directed that the residue should be divided in equal moieties
[*572] between the *said Thomas Rockcliffe the younger and the said John Welby.

Leonora Brown survived her husband; and the only question in the cause was, whether her annuity was charged on the Wilsford estate in exoneration of the personalty; or whether it was to be paid in the first instance out of the residue?

The cause was heard as a short cause before Lord Gifford at the rolls. His Lordship decided that the annuity given to Leonora Brown was, as between John Welby and Thomas Rockcliffe, charged by the testator's will and codicil upon the real estate at Wilsford, and upon Thomas Rockcliffe personally in exoneration of the testator's personal estate; and that Thomas Rockcliffe, therefore, was bound to elect whether he would renounce all benefit under the will and codicil, or provide a proper security for the due payment of the annuity.

Thomas Rockcliffe appealed from that decision.

Sir *Edward Sugden* and Mr. *Koe*, for the appellant, contended that there was nothing on the face of this will indicating that the burden was to fall primarily (which would in effect be exclusively,) upon Thomas Rockcliffe. On the contrary, the testator's intention, as far as it could be collected, was to place the two principal devisees upon the same footing; an intention which would be entirely frustrated, if Lord Gifford's decree were allowed to stand. In order to exempt the personal estate from the payment of debts, it was not enough for a testator to impose them as an express charge upon his real estate; he must also, in direct terms, or by language raising a ne-

cessary implication, exonerate his *personal estate, the natural fund [*573] out of which they were otherwise to be satisfied. The judgment of Sir William Grant, in *Watson* v. *Brickwood*,(a) established as a principle, that the most anxious provisions, prescribing the manner and proportions in which a charge is to be borne by the devisees of real estate, are insufficient to render that estate liable in the first instance; because all such provisions are considered as introduced prospectively only, in case the land shall become ultimately chargeable, and not for the purpose of making it chargeable at all events. That case indeed was much stronger than the present, for the gift of the personalty was of a specific sum, whereas, here it was merely of a residue. The principles laid down in *Watson* v. *Brickwood*, were afterwards recognized and approved by Lord Eldon in *Bootle* v. *Blundell*,(b) and have been uniformly adhered to ever since.

Mr. *Pepys* and Mr. *Cockerell*, contra, argued, that to exonerate the personal estate, no technical form of words was requisite, provided such an intention could be fairly collected from the language employed by the testator. It was sufficient if the context of the will, and the circumstances appearing on the face of it, manifested that intention in a way to satisfy the mind of the particular judge by whom the question was to be decided; *Bootle* v. *Blundell*,(b) *Browne* v. *Groombridge*.(c) With this view the two instruments, the will and codicil, ought to be considered in connection. By the former, the charge was imposed upon the Wilsford estate, for the very purpose of securing the regular payment of the debt constituted by the annuity, without trenching upon the fund devoted to the pecuniary *legacies; and although it [*574] was thus thrown primarily on the property devised to Rockcliffe, his interest did not thereby suffer, since whatever surplus might remain, after satisfying the debts and legacies, he would still take as residuary legatee. If, however, any doubt could remain upon the first part of the will, it was removed by the subsequent clause, in which the annuity, previously charged upon the land, was moreover charged personally upon Thomas Rockcliffe, his heirs, executors, and administrators. The payment of the debt was thus made the express condition of the bounty; and, upon the ordinary principles of election, therefore, the defendant could claim no benefit under the will, unless he submitted to comply with all its requisitions. The codicil, by which one-half of the residue was withdrawn from Rockcliffe and given to the plaintiff, could not vary the construction to be put upon the will; for it left the clause charging the Wilsford estate exactly as it stood before, and made no provision for relieving the devisee from any portion of the burden.

Sir *Edward Sugden*, in reply.

June 15.—The Lord Chancellor, after stating the material parts of the will and codicil, observed, that the effect of the two instruments taken to-

(a) 9 Ves. 447. (b) 1 Mer. 183. 19 Ves. 509. (c) 4 Mad. 495.

gether was, to devise the estate of Wilsford to Thomas Rockcliffe in fee, and that of Willoughby to John Welby in fee, and subject to the pecuniary legacies, to give the personal property in equal moieties between the two; and, at the same time, to charge the estate of Wilsford, and Thomas Rockcliffe the devisee of that estate, personally, with the payment of the annuity in question. His Lordship was of opinion that, under these circumstances, it was the manifest intention of the testator, that the owner of the Wilsford [*575] *estate should be primarily charged with the burden; and he saw no ground whatever, therefore, for altering the judgment of Lord Gifford.[1]

Ex parte Swift, in the Matter of Swift.(a)

1828; August 4. V. C.

Order made upon petition that part of a small sum of stock bequeathed to an infant should be sold and the proceeds applied in paying a debt incurred for necessaries on his account, and that, the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance.

The petition of William Cornelius Swift, an infant, and his mother Martha Christiana Swift stated, that the grand father of the infant had bequeathed him a sum of 200*l.* stock, which was secured to the testator by the bond of his son, the father of the infant, together with all the interest that might be due upon the bond at the time of the testator's decease; that the will was duly proved in December, 1820: that the infant's father became insolvent, and, in February, 1827, conveyed his estates to trustees, to be sold for the benefit of such of his creditors as should execute the trust deed; that the estates were sold accordingly, and that the creditors who joined (including among others the executrix of the grand father's will,) received out of the proceeds, a dividend of 6*s.* in the pound upon the amount of their several debts; and that the dividend received by the executrix, on account of the bond debt bequeathed to the petitioner, amounted to 54*l.* 13*s.*, which sum had been laid out in the names of trustees in the purchase of 60*l.* 19*s.* 11*d.* three per cent. reduced bank annuities; that the father of the infant petitioner had deserted his family and had absconded, leaving his wife with William C. Swift and five [*576] other children, all infants *of tender years, dependent upon her for support, and without any means of providing for them, except by her own labor; that she had incurred a debt of 8*l.* 10*s.* for clothing and necessa-

(a) This and the following case are inserted here in consequence of their connection with the subject considered in *Ex parte Knott, in the matter of England*, ante, p. 499.

[1] Where land is devised, provided the devisee pay the legacies mentioned in the will, if he accept the devise, he becomes personally liable for the legacies; but they are, notwithstanding such personal liability, an equitable charge upon the estate devised. *Birdsall* v. *Hewlett*, 1 Paige, 32.

ries on account of her son William C. Swift, who had no other fortune than his grandfather's legacy, and no means of discharging the debt, his only regular income being a salary of 18*s.* a week. The petition prayed that a sufficient part of the 60*l.* 19*s.* 11*d* reduced annuities to discharge the said debt, and the costs of the application, might be sold, and that the residue might be transferred into the name of the accountant general, and the dividends as they became due, paid to the petitioner Martha C. Swift, for the maintenance of the other petitioner, her son.

The trustees were served with the petition, but did not appear.

Mr. *Rogers* for the petitioners.

The Vice-Chancellor made the order.

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*Ex parte Chambers, in the Matter of Chambers. [*577]

1829; June 18. L. C.

Order made upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education, and advancement, though the shares did not vest till the children came of age

This was the petition of Frances Ann Chambers, Elizabeth Chambers, Charlotte M. Chambers, Emma Chambers, and Robert W. Chambers, who were the infant children of John Chambers, deceased, and were of the respective ages of seventeen, sixteen, fifteen, fourteen, and eleven years.

The will of John Chambers, of Orton, farmer, charged certain real estates (thereby devised to his son Andrew,) with a legacy of 150*l.* to his son, the petitioner Robert W. Chambers, and with legacies of 100*l.* each to the other petitioners, his daughters, which sums were to be paid to them respectively on their severally attaining the age of twenty-one, or being married with the consent and approbation of his executors, which ever should first happen. The testator further charged the devised estates with the payment of interest at four per cent. upon each of the aforesaid sums from the time of his decease until they should become payable; and he directed the interest to be applied in the mean time towards the maintenance, education, and bringing up of the several parties entitled to the principal money. All the rest and residue of his personal estate he gave to two trustees (whom he also named his executors and the guardians of his children,) upon trust for his infant children, the petitioners, at twenty-one, or marriage with such consent as aforesaid, with benefit of survivorship and accruer, and he directed that their respective shares of such residue, which, in the case of the daughters, were *to be one-third less than that allotted to the [*578] son, should be laid out and remain at interest till they became seve-

rally payable, and should be subject to the like proviso with respect to the application of the interest in the mean while, as the will declared relative to the charges upon the devised estates. The will then contained the following clause:—"And I hereby give full power and authority to my said executors and trustees, from time to time, to advance such sum or sums of money as they, or the survivor of them shall think necessary, out of the portion or portions to which such children shall be entitled as aforesaid, to pay for an apprentice fee, or otherwise, in the discretion of my said executors, or the survivor of them, for the advancement in life of any of my said children during their respective minorities, and to deduct the money so advanced out of the principal money to which such child or children may respectively be entitled under this my will." The testator died in June, 1828, and his will was proved by the executors in January, 1829.

The petition, after setting forth these facts, stated, that the mother of the petitioners was dead, and that the petitioners were left wholly unprovided for, and had no property, except what they might become entitled to by virtue of their father's will; that their shares in their father's residuary personal estate, over and above the sums charged upon the land in their favor, were estimated to amount to about 300*l.* to the son Robert W. Chambers, and to about 200*l.* to each of the daughters, the interest of which would be altogether inadequate to their support and education. The prayer was, that the guardians of the petitioners, and executors of the will, might be authorized to pay, towards the advancement in the world of the infant petitioners respectively, the whole or such part of their respective shares of the [*579] residue, as *the said guardians and executors might in their discretion think proper, by way of fee or premium upon placing them out as apprentices, or in their maintenance, education, and clothing.

The allegations in the petition were verified by the affidavit of one of the trustees; who farther deposed, and if he and his co-trustee were authorized to make, at their discretion, advances of the kind now sought, it would, in his opinion, greatly assist the success of the infants in life; and that, unless, such authority was given, he did not know how they were to gain a livelihood, without accepting menial situations, or applying for parochial relief.

Mr. *W. Lee*, who appeared in support of the petition, submitted, that where the legacies, left by a parent to his infant children, are so small that the interest, till the infants came of age, would go but a little way towards their maintenance and education, whereas the principal might be most usefully applied before that period in preparing them for getting forward in the world, the court, for the sake of better effectuating the testator's wishes, has considered itself at liberty to break in, to some extent, upon the capital; *Barlow* v. *Grant*,(*a*) *Franklin* v. *Green*,(*b*) *Harvey* v. *Harvey*,(*c*) *Ex parte*

(*a*) 1 Vern. 255. (*b*) 2 Vern. 137. (*c*) 2 P. Wms. 21.

Green,(a) *Ex parte Swift*;(b) and it would be more especially disposed to do so in the present instance, where some discretionary power for the advancement of the infants was already expressly vested in the trustees. These children would start in life with better prospects of success, if, on coming of age, they had *obtained the advantage of a good education, and had each 100*l.* in their pockets, than they could do, though possessed of thrice that sum, if their minds had been left till then without discipline or instruction. The language of Lord Keeper North was, that, "the money laid out in the child's education was most advantageous and beneficial for the infant; and, therefore, he should make no scruple of breaking into the principal, where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education."(c) It was not necessary that a bill should be filed, or even a reference be directed; *Ex parte Green*. Speaking of applications of this description by petition, Lord Hardwicke observed, in *Ex parte Whitfield*,(d) "that it might be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for any thing they do on account of maintenance, which otherwise would be at their own peril, and likewise of use in saving the expense of a suit to an infant's estate." [*580]

The Lord Chancellor, after some hesitation, made an order that the executors and guardians might be at liberty to pay out of the respective shares of the petitioners in their father's residuary estate, the sum of 25*l.* on account of Robert W. Chambers, and 20*l.* on account of each of the female petitioners, towards their maintenance, education, and advancement in the world.[1]

(a) 1 J. W. 253. Most of the other cases on the subject are mentioned in the note to 1 Vern. 255, 3d edit.

(b) Ante, p. 575. (c) 1 Vern. 255. (d) 2 Atk. 316.

[1] As to granting orders without a reference, on *ex parte* application, where the property is small, see *Ex parte Farrow*, ante, 112. *Payne* v. *Low*, ante, 223.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

BAGLEY *v.* MOLLARD.

ROLLS.—1830; May 26, June 12.

Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children.

A testator devised a leasehold in trust for his "grand child, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares; Elizabeth was illegitimate, and William had no other child: Held,

That Elizabeth did not take any share of the residue.

THE will of John Mollard, dated in 1810, contained, among other bequests, the following:—"I give and bequeath unto my son, James Mollard, his executors and administrators, all that my other messuage, tenement, or dwelling house and premises, with their appurtenances, at Knightsbridge aforesaid, and held by me under the said lease, and now let to Richard Davis, bricklayer; to hold to my son, James Mollard, his executors or administrators, for and during all the remainder of my term, estate, and interest therein; in trust, nevertheless, that he, my said son James Mollard, his executors or administrators, do and shall, from the quarter day [*582] next after my decease, receive and take the rent *thereof, and, after and subject to the paying the proportionable part of the reserved rent to the ground landlord thereof, fine and fees of renewal, and charges and expenses of keeping the said premises in tenantable repair, pay, apply and dispose of the net clear surplus or residue of such rent, or any improved rent thereof, for and towards the support and maintenance of my grand child, Elizabeth Mollard, the now only surviving child of my son, William Mollard, until she shall attain the age of twenty-one years, or day of marriage; such marriage being with the privity and consent of my said son James Mollard, his executors or administrators, and not otherwise; when I give and bequeath the then term of years, estate, and interest in my said lease, or any renewed lease thereof, and the renewed lease thereof, and the messuage and premises

thereby demised, unto my said grand daughter, the said Elizabeth Mollard, her executors, administrators, and assigns (subject as aforesaid,) she or they giving and executing to my executors a release and discharge on giving up the possession thereof; when I will order and direct the said James Mollard, his executors or administrators, to assign such lease and premises unto my said grand daughter, or as she, in case of her marriage with such consent as aforesaid, shall then direct or appoint, but for her own sole use and benefit." He disposed of the residue of his estate in the following words:—"And as to all the rest, residue and remainder of my real estate, whether in possession, remainder or expectancy, I give and devise the same unto my said wife, Elizabeth Mollard, and her assigns, for and during the term of her life; and from and after her decease, then I give and bequeath the same, together with the general residue of my leasehold and personal estate, chattels and other effects whatsoever and wheresoever, moneys, and securities for money and debts of every kind, not hereinbefore by me given and bequeathed absolutely or in trust *in manner aforesaid, to and for the sole use and [*583] behoof and benefit of my said daughter, Mary Bagley, to hold to her and her assigns for and during her life; and from and after her decease I give, devise, and bequeath the same and every part thereof, according to the tenor of such estate, and my term, estate, and then interest therein unto, among, and between all and every the children of my said son, James Mollard, William Mollard, and Mary Bagley, as shall be then living, and to receive and take the same as tenants in common, and not as joint tenants, their heirs, executors, administrators, and assigns; and I hereby nominate and appoint my said son, James Mollard, and Robert Bagley guardians to all and every my said grand children during their respective minorities, or until their marriages with such consent as aforesaid."

The testator died in 1811, leaving two sons, James Mollard and William Mollard, and one daughter, Mary Bagley, him surviving.

Elizabeth Mollard, named in the will, was an illegitimate child of William. In 1794, after her birth, he intermarried with her mother, and had subsequently two sons, both of whom died in 1810. He never had any other legitimate issue. James Mollard, the son, had three illegitimate children, but no legitimate issue.

The question in the cause was, whether Elizabeth Mollard was entitled to a share of the residue.

Mr. *Bethel*, for Mary Bagley and her children. Children in the residuary gift must be construed legitimate children; and the circumstance that there are no legitimate children of William cannot vary the *con- [*584] struction. *Godfrey* v. *Davis*,(a) *Cartwright* v. *Vawdry*,(b) *Kenebel* v. *Scrafton*,(c) *Swaine* v. *Kennerley*,(d) If William had legitimate children, they would unquestionably be the persons to take; and no instance can be

(a) 6 Ves. 43. (b) 5 Ves. 530. (c) 2 East, 530. (d) 1 Ves. & B. 469.

found in which legitimate and illegitimate children have taken under the same description. "It was argued with great force," says Lord Eldon, in *Wilkinson* v. *Adam*,(a) "that, if this testator had lived until the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both take under the same description: and it would be very difficult to persuade me that they can." If an illegitimate child of William is entitled under this residuary bequest, why should it not also include illegitimate children of James and Mary? In *Wilkinson* v. *Adam*, the children, in whose favor the devises were made, were in substance, though not in name, described in the will as illegitimate: and so unequivocal was the description, that Lord Eldon observes,(b) "It is impossible that he could mean any thing but illegitimate children." Here Elizabeth Mollard is not described as illegitimate; and there is no allusion in the will to any circumstance which could even suggest the notion of illegitimacy.

Mr. *Girdlestone*, jun., for Elizabeth Mollard:—In *Wilkinson* v. *Adam*, it was held, that, under a devise to the children whom the testator might have by Ann Lewis, who was not his wife, three natural children of Ann Lewis, who, at the date of the will, had acquired the reputation of being the [*585] testator's, would take: and the ground of the decision was, that it appeared, from the contents of the will, that illegitimate children were the objects of the testator's bounty. In the present case, Elizabeth Mollard is described as the grand-child of the testator, and the only surviving child of William: and the testator must have meant to include her among the children of his sons James and William. To exclude her from taking a share of the residue as a child of William, is to refuse to her the character which the will expressly gives her. It has never been decided, that legitimate and illegitimate children can in no case take together under the description of children; and, in *Wilkinson* v. *Adam*, the three common law judges inclined strongly to the opposite opinion. "It was possible," said they,(c) "that the testator might outlive his wife, and marry Ann Lewis, and have legitimate children by her: the words of the devise are large enough to include such children; and there appears no express intention to exclude them; though probably the testator had them not in contemplation. We incline to think, therefore, that such children would take under the devise; but the conclusion drawn from thence, that, under the circumstances of this case, the illegitimate children cannot take with them, is not, as we think, well founded. We think that the illegitimate children take, because they were clearly meant; and that if legitimate children of the description above mentioned would also take, it is because the words are large enough to reach them, and the testator expressed no intention to exclude them, though he did not contemplate their existence."

(a) 1 Ves. & B. 468. (b) 1 Ves. & B. 469. (c) 1 Ves. & B. 454.

They then proceed to comment at considerable length on the cases which had been referred to in the argument as establishing a contrary doctrine.

*Mr. *Girdlestone*, sen., for other defendants. [*586]

June 12.—THE MASTER OF THE ROLLS:—The testator John Mollard, having three children living, namely, James Mollard, William Mollard, and Mary Bagley, bequeathed a leasehold house to his son James Mollard, in trust for his grand child Elizabeth Mollard, whom he described as the then only surviving child of his son William Mollard; and he concluded his will by a residuary bequest to all and every the children of his sons James Mollard, William Mollard, and his daughter Sarah Bagley. Elizabeth Mollard, the grand child, was illegitimate; and the question in the cause is, whether she was entitled to a share under the residuary gift?

In the case of *Wilkinson* v. *Adam*, the common law judges, who assisted Lord Eldon, seem to have entertained an opinion that illegitimate children, who were described in the will, might take jointly with legitimate children, under the general description of children; but Lord Eldon was plainly not of that opinion; and I entirely concur with him in thinking, that, whenever the general description of children will include legitimate children, it cannot also be extended to illegitimate children. In *Wilkinson* v. *Adam*, the illegitimate children were described to be illegitimate in the will, which is not the case with respect to Elizabeth Mollard. But I am of opinion that this circumstance makes no difference in the case.

I must declare that Elizabeth Mollard is not entitled to a share of the residue.(*a*) [1]

(*a*) *Harris* v. *Lloyd*, 1 Turn. & Russ. 310.

[1] Where there are legitimate children in existence at the time of making the will, so as to satisfy the words of the devise or bequest in their primary sense, an illegitimate child cannot take under a general devise or bequest to children, as a class, unless there is something else appearing in the will to show that the testator intended to include others besides legitimate children. *Collins* v. *Hoxie*, 9 Paige, 81. A testatrix gave a share of her residuary estate to the children of Mary Gladman deceased. Mary Gladman left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of Mary Gladman, that the testatrix well knew that fact, and that Mary Gladman left only those two children. *Gill* v. *Shelley*, 2 Russ. & M. 336. In that case Leach, M. R. said: "The question in cases of this sort is a question of intention. *Prima facie*, the term children is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, no illegitimate child can take under the description of children." "Considering, then, that 'children' is an ambiguous term, which may mean legitimate child or illegitimate children who have acquired the reputation of being children; and assuming that if there are, or by any possibility may be, legitimate children to satisfy the expression, no illegitimate child can take together with the legitimate children. I think the evidence admissible in this case; and the evidence being admitted, demonstrates that the testatrix did mean to include the defendant Charlotte Shelley under the expression of 'the children of the late Mary Gladman.'" In an earlier case, Mr. Ch. Walworth observed, "I have looked into the several cases which were referred to on the argument, and find nothing which places wills made in favor of natural children on a different footing, as to construction, from those made in favor of other persons. As a general rule,

[*587] *SABERTON *v.* SKEELS.[1]

1830; June 12.

The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will.

THE testator Thomas Skeels, by his will gave to each of his daughters the sum of 1000*l.*, which he directed to be settled in manner thereinafter men-

a devise to children without any other description, means legitimate children; and if the testator has such children, parol evidence cannot be received to show that a different class of persons was intended. But in this case, as in all others, it is proper to look into circumstances *dehors* the will, to see whether there are any persons answering the description of the legatees in the legal sense of the term, and if it appears there are no such persons, it is then allowable to prove the situation of the testator's family, to enable the court to ascertain who were intended by the testator as the objects of his bounty." *Gardner* v. *Heyer*, 2 Paige, 11, 14. A married woman having several legitimate children, and one illegitimate child, and being separated from her husband, and *enceinte* with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety in favor of any after born children she might have born of her body. After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund between the two illegitimate children; and it was held that the after born children for whose benefit the revocation might be made, must be taken, in the primary and legal sense, as applying to legitimate children only,—that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment. Wigram V. C. said: "It has been insisted, in argument, that the after born illegitimate [children] of a woman are capable of taking from their mother an interest, in the character of children, in cases where such children of a man could not take any interest in that character. What the decision ought to be in a case where that argument applies, I am not called upon to give any opinion; but if I wanted authorities to show that with reference to the children of females as well as those of males, the word 'child,' uncontrolled by the facts, and unexplained by the context of the deed or will, must have its primary and legal meaning, I should have no difficulty in finding them"—"The word 'child' has often been construed in two different senses in the same instrument. If a gift were made to the children of A. now living—if A. had none but illegitimate children, and they had acquired by reputation the character of his children, they would no doubt take under the gift; and a bequest by the same will to the after born children of A. would be satisfied by construing the word 'child' in its proper sense, and in the latter bequest illegitimate children would take no interest. *Frazer* v. *Pigott*, 1 You. 354, is not the only decision on that point. In the argument of this case I have called on the counsel for the plaintiffs to show me that I have any right to suppose that other than legitimate after born children were intended. It does not appear to me that the words 'born of her body, but not otherwise,' add anything to the effect of the word 'child.' They leave the legal interpretation uncontrolled. The cases all decide that the word 'child,' taken *simpliciter*, means a legitimate child only, unless there are any words by which that sense may be controverted, or anything in the context showing that the word is intended to be used in a secondary sense, or some extrinsic facts and circumstances, which show that the word 'child' could not have been used in its only proper sense. In this case, it does not appear to me that there is anything on the face of the instrument to divert the expression from its proper meaning." *Dover* v. *Alexander*, 2 Hare, 275. The plaintiff had made a settlement of personalty upon H. and M., his daughters by L. W. (with whom he was never married,) and all other the children he might thereafter have by her, and in case they should all die under twenty-five, in trust for the settlor, his executors, &c. H. and M. died under twenty-five, but there were other children born after the execution of the settlement, who claimed the fund. The Vice-Chancellor (Knight Bruce,) decreed that the fund should be transferred to the plaintiff. *Wilkinson* v. *Wilkinson* 1 You. & Coll. C. C. 657. A

[1] S. C. Taml. 383.

tioned; and he then directed the settlement in the following words:—"And as to the said several sums of 1000*l.* so to be settled, I do hereby direct that each sum of 1000*l.* so belonging to each be invested in the funds, in the names of my said trustees and the daughter entitled to the same, or shall, in the same names, be put out on real security, the interest thereof to be paid to the daughter entitled to the same, for which her receipt alone shall be sufficient, and which shall not be subject to the debts or control of any husband she may have, and shall, after her death, pass and be subject according to any will or disposition she may under her hand and seal make thereof, and for want thereof, shall go to her personal representatives; and if the daughter so entitled to the said sum of 1000*l.* shall at any time choose to sink the same, or any part or parts thereof in the purchase of one or more annuities for her own life, in like manner payable to her for her sole use, and not subject to the debts of her husband, my said trustees, together with such daughter, are hereby authorized and required to invest the same accordingly on government or good real security, but not otherwise."

The plaintiff was the husband of one of the daughters, who had died leaving children; and the wife having made no appointment of the 1000*l.* by will or otherwise, the plaintiff took out administration to her, and claimed to be entitled to the 1000*l.*

*Mr. *Tinney*, Mr. *Preston*, and Mr. *Cockerell*, for the plaintiff. [*588]

Mr. *Lynch*, for the children.

Mr. *Bickersteth*, for other defendants.

The argument for the plaintiff was, that "personal representatives" was synonymous with "executors and administrators," and gave the daughter an absolute interest; that this interest was not displaced by the power of appointment, which had not been exercised; and, consequently, that the husband was entitled as administrator to his wife; or if it should be held that the personal representatives of the wife were to take as purchasers, the husband alone sustained the character of personal representative; in that character he would take the fund as a purchaser; and there was no principle of law on which he could be held to be a trustee for the children.

On behalf of the children, it was argued, contra, that the words could not be considered to vest in the wife an absolute interest in the fund, because such an interest was inconsistent with the total exclusion of the marital right of the husband: that the express authority given to the wife to sink the principal in the purchase of an annuity for her life would have been unnecessary, if the corpus of the legacy had vested in her absolutely; that, the legacy being given to the separate use of the wife for life, remainder to such person as she might appoint, remainder to her personal representatives, whoever took as personal representative could take only as a purchaser; that there was a mani-

natural child can have no guardian except by the appointment of the court; but the testator, the reputed father, having named his executor the guardian, the Lord Chancellor (Hart,) made the appointment of the person named, without a reference to the master. *Barry* v. *Barry* 1 Moll. 213.

fest intention to exclude the husband ; and that the next of kin must have been those whom the testator meant to designate by the words " personal representatives."

[*589] *The following authorities were cited :—*Price* v. *Strange*,(*a*) *Evans* v. *Charles*,(*b*) *Bridge* v. *Abbot*,(*c*) *Jennings* v. *Gallimore*,(*d*) *Long* v. *Blackall*,(*e*) *Anderson* v. *Dawson*,(*g*) *Bailey* v. *Wright*,(*h*) *Ripley* v. *Waterworth*,(*i*) *Wellman* v. *Bowring*,(*k*) *Garrick* v. *Lord Camden*.(*l*)

THE MASTER OF THE ROLLS :—All words are to be understood in their ordinary sense, unless controlled by the context of the will.[1] The ordinary sense of the words " personal representatives" is, executors and administrators; and the substitution of these words for " personal representatives" would vest an absolute interest in the wife. I find in this will nothing to control this ordinary sense : on the contrary, it is forfeited by the power given to invest the 1000*l.* in the purchase of an annuity for the life of the wife, which manifests that she was the sole object of the testator's intention ; and the interest thus vested in the wife belongs to the plaintiff, as her husband and administrator.[2]

(*a*) 6 Mad. 159. (*b*) 1 Anst. 128. (*c*) 3 Bro. C. C. 224. (*d*) 3 Ves. 146.
(*e*) 3 Ves. 486. (*g*) 15 Ves. 532. (*h*) 18 Ves. 49.
(*i*) 7 Ves. 425. (*k*) 2 Russ. 374. (*l*) 14 Ves. 372.

[1] Vide *Mounsey* v. *Blamire*, 4 Russ. 384. *Whatford* v. *Moore*, 3 Myl. & Cr. 290. *Roosevelt* v. *Thurman*, 1 Johns. Ch. Rep. 228. *Moffatt* v. *Carrow*, 7 Paige, 328. *In the matter of Hallett*, 8 Paige, 376. *Tawney* v. *Ward*, 1 Beav. 567. *Vaughan* v. *Marquis of Headfort*, 10 Sim. 641. *Parker* v. *Marchant*, 1 Yo. & Coll. C. C. 300, 303.

[2] A testatrix gave real and personal estate to trustees in trust for M. K. for life, with remainder as she should appoint ; and in default of appointment, in trust to convey the real estate to or amongst such person or persons as would be the *personal representatives* of M. K. M. K. appointed only a part of the personal estate. The next of kin, and not the executors, were held to be entitled to the unappointed part of the personal estate. *Baines* v. *Ottey*, 1 Myl. & K. 465. As to the term *legal representatives*—the testator gave 450*l.* to trustees their executors, &c. in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the *legal representatives* of the son : and he gave the residue of his personal estate to his son, his executor, &c. ; it was held on the construction of the will that the words *legal representatives* meant *next of kin*. *Walter* v. *Makin*, 6 Sim. 148 ; and see *Cotton* v. *Cotton*, 2 Beav. 67. So, in *Drake* v. *Pell*, 3 Edw. Ch. Rep. 270, M'Coun, V. C. said :—" With respect to the words ' legal representatives,' if the property transmitted be personal estate, the persons designated by, and answering to this description are those who, by the statute of distributions, are known by the next of kin, and not the executors or administrators of a deceased child. The testator doubtless meant those who should take beneficially to themselves as owners, and not in a mere official or representative capacity in the right of the deceased child. Here executors or administrators are excluded ; and though the property may be personal, and they in one sense, may answer to the description of legal representatives, they are not in this case the persons intended." The word " representatives" in a will was construed to mean " descendants," the context requiring it. *Styth* v. *Munro*, 6 Sim. 49. As to the construction of the word " heir," in a will of personalty, see *Gittings* v. *M'Dermott*, 2 Myl. & K. 70. *Mounsey* v. *Blamire*, 4 Russ. 384. *Wright* v. *Methodist Church*, 1 Hoff. Ch. Rep. 212. The term " devisee" was construed to mean " legatee," in *Coope* v. *Banning*, 1 Sim. & Stu. 531. All cases of this description must necessarily depend upon the language of the will itself ; and it is well observed by Mr. J. Story ;—" It is now admitted to be established, as the general rule, that the intention of the testator is the pole star to direct the court in the construction of wills, and that technical words and set phrases are controlled by, and do not control that intention, when clearly expressed, or positively as-

*Wilson v. Halliley. [*590]

Rolls.—1830; June 12, 14.

Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied.

The will of the testator, Benjamin Wilson, contained, *inter alia*, the following bequests:—"I give, devise, and bequeath unto my good friends Richard Tinker, John Halliley, and Thomas Todd, whom I hereby appoint joint executors of this my will, and their heirs, upon the trusts nevertheless, and to and for the ends and purposes hereinafter expressed and declared, that is to say, upon trust that they, the said John Halliley, and Richard Tinker, and Thomas Todd, or the survivors or survivor of them, or the heirs of such survivor, shall, and do, as soon as conveniently may be after my decease, dispose of, collect, get in, and convert into money, all my personal estate and effects; and also shall and do, at such time as to them or him shall seem most proper, sell and dispose of all and every my shares, estate, and interest in the Huddersfield Canal for the best and utmost price that can be had or gotten for the same, and on payment of the purchase money, to sign and give proper, valid, and effectual receipts, and other discharges and acquittances for the same; and by all lawful ways and means, to convey the said shares, estate, and interest unto the purchaser or purchasers thereof, and with and out of the moneys to arise and be gotten in, by the means aforesaid or otherwise, under or by virtue of this my will, and the rents, issues, and profits of my said real estates, and every of them, and every part thereof, in trust, in the first place, to pay the said legacy or sum of 50*l.* by me hereinbefore given

certained. The consequence is, that decisions upon particular wills are of far less consequence now, than they formerly were supposed to be; unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies, by which to interpret the words of wills in new cases." *Blagge* v. *Miles*, 1 Story's Rep. 445, and see 3 Myl. & Cr. 613, n. 1. In *Bulmer* v. *Jay*, 4 Sim. 48; S. C. 3 Myl. & K. 196; a case arising under a marriage settlement, the words "executors or administrators" were construed to mean, "next of kin." But Lord Lyndhurst evidently disapproved of that decision: "Legal or personal representatives," he says, "may mean next of kin, but executors or administrators cannot. Therefore, none of those cases in which next of kin have been held to take *ex vi termini*, by the description of legal or personal representatives, have any application to the present. The limitation in this case being to the executors or administrators, it seems to me, that it cannot signify whether these words are construed as words of limitation or words of purchase; because on either supposition, the persons answering that description take in their representative character, and then the fund is to be applied and administered in the same manner as any other assets that come to them in that character. That is the doctrine of all the cases that have been cited, except that of *Bulmer* v. *Jay*, which stands alone." *Daniel* v. *Dudley*, 1 Phillips, 7. S. C. 11 Sim. 163. In a case, also arising under a marriage settlement, Lord Langdale, M. R. observes; "cases have occurred, in which to support the plain intent, the words 'personal representatives,' or 'executors and administrators,' have been construed to mean next of kin; but the words 'executors, administrators, *and assigns*,' do not appear to me to admit of this interpretation." *Graffety* v. *Humpage*, 1 Beav. 52. See further *Smith* v. *Dudley*, 9 Sim. 125.

to my said wife; and the said annuity or yearly rent charge of 100*l.* or 50*l.*, as the case may be, to her and her assigns for and during the term of [*591] her natural life; and, in the next place, to *pay and satisfy my funeral expenses, and all such debts as shall be due and owing by me to any person or persons whomsoever, by specialty, simple contract, or otherwise howsoever, at the time of my decease, or which shall afterwards become due, and the interest of such of the said debts as shall carry interest; and, in the next place, to levy and raise out of the rents and profits of my said real estate the sum of 5850*l.*, and place the same out at interest on some eligible security or securities, and pay the interest or proceeds of the sum of 1000*l.*, part thereof, when and as the same shall be received, unto my brother, Joseph Wilson, and his assigns, for and during the term of his natural life; and as soon as conveniently may be after his death, to call in the sum of 1000*l.*, part of the said principal sum of 5850*l.*, and pay the sum of 200*l.* out of the same unto my nephew Thomas, son of my said brother Joseph, and the remaining 800*l.* unto and equally amongst all other the children of my said brother Joseph; and upon trust to pay the interest of the sum of 1500*l.*, other part of the said sum of 5850*l.*, when and as the same shall be received, unto my said nephew, John Rhodes, and his assigns, for and during the term of his natural life, and as soon as conveniently may be after the death of the said John Rhodes, to call in the said sum of 1500*l.*, part of the said sum of 5850*l.*, and pay and divide the same unto and equally among all and every the children of the said John Rhodes; and upon trust to pay the sum of 1500*l.*, other part of the said sum of 5850*l.*, unto and equally amongst all and every the children of my sister Mary, who was in her lifetime the wife of David Blaymire; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Frances Blakeley, the wife of Reuben Blakeley, or her legal representatives: and whereas I am now responsible as surety for the said Reuben Blakeley unto Richard Greenwood, for [*592] the sum of 100*l.*, *now it is my will and mind, and I do hereby order and direct my said trustees and executors to deduct and retain the said sum of 100*l.*, and all interest now due or hereafter to become due in respect of the same, unless it shall happen to be paid and satisfied by the said Reuben Blakeley, or some other person or persons on his behalf, out of the said sum of 400*l.* by me hereinbefore directed to be paid to the said Frances Blakeley as aforesaid; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Sarah Gill, the wife of John Gill, or her legal representatives; and upon trust to pay the sum of 400*l.*, other part of the said sum of 5850*l.*, unto my niece, Ann Hinchcliffe, the wife of Marmaduke Hinchcliffe, or her legal representatives; and in the event of my wife Mary not surviving me for the space of five years, but not otherwise, upon trust to pay the sum of 300*l.*, other part of the said sum of 5850*l.*, unto Miss Elizabeth Tinker, the sister of my said wife, or to her legal representatives: but if my said wife should happen to live beyond the

time above mentioned, then it is my will and mind that the said sum of 300*l.* shall sink into and become part of the residue of my said estate and effects, and be disposed of in manner hereinafter mentioned; and upon trust to pay the sum of 200*l.*, other part of the said sum of 5850*l.*, unto John Oldroyd, his executors, administrators, and assigns, if he should live to attain the age of twenty-one years, but not otherwise; and upon trust to place the sum of 100*l.*, other part of the said sum of 5850*l.*, out at interest on good security, and pay the interest, dividends, and proceeds thereof, when and as the same shall be received, unto Richard Oldroyd, the brother of my late wife, and his assigns, for and during the term of his natural life, and, as soon as conveniently may be after his death to call in the said sum of 100*l.*, and pay the same unto and equally among *all and every his children; and [*593] upon trust to pay the sum of 50*l.*, residue of the said sum of 5850*l.*, unto William Rhodes, son of my nephew John Rhodes, his executors, administrators, and assigns, if he shall live to attain the age of twenty-one years, but not otherwise; also I give and bequeath unto James Crosland, my apprentice (if he continue in my service, or in that of my trustees or executors, until the expiration of his indentures of apprenticeship, by lapse of time, but not otherwise,) the sum of 10*l.*, which I direct shall be paid to him out of my estate and effects.

And it is my will and mind, that, in case any of the legatees or other persons entitled to any benefit or interest under or by virtue of this my will, shall happen to die before the money, or the benefit, or provision hereby given or made to or in his, her, or their favor shall be raised and paid, and shall leave lawful issue, then it is my will and mind, and I do hereby direct my said trustees and executors to apply the interest of the money, which the parent so dying would have been entitled unto under this my will, for and towards the maintenance and education of such issue, until the younger of them shall attain the age of twenty-one years; and then I will and direct that the principal money, or the parent's share, shall be forthwith paid and divided unto and equally amongst such issue, if more than one, but if only one, wholly to that one. And it is my will and mind, and I do hereby direct my said trustees and executors to carry on the colliery which I now possess in Dewsbury aforesaid, and also the mill there which is now in my own occupation, if an eligible tenant cannot be procured for the said mill, or if my said trustees think it most advisable to retain the said mill in their hands; and I hereby authorize them, and the survivors and survivor of them, and the heir of such survivor, to occupy and retain in their hands the lands now in my *possession, and by such ways and means as to [*494] them shall seem best, to raise and levy out of my estate, effects and property, whether real or personal, so much and such sums and sum of money as shall be requisite and expedient the better to enable them and him to carry on and continue the said colliery, mill and works; and from time to time to appoint a proper person or persons, with an adequate salary or sala-

ries, to superintend such colliery and mill, and the works, affairs, and business relative thereto; and I do hereby authorize and empower my said trustees and executors, and the survivors and survivor of them, and the heirs of such survivor, at any time or times, until all and every the trust hereby in them reposed shall be carried into effect, by indenture or indentures, or other instrument in writing, under their respective hands and seals, whether referring or not referring to this present power, to grant, demise, or lease all or any part of the real estate by me hereby given and devised to them as aforesaid to any person or persons, for any term or number of years not exceeding seven years from the making thereof respectively, to take effect in possession or within six months after the making thereof, and not in reversion or by way of future interests, so that upon every such lease there be reserved and made payable half-yearly during the continuance thereof and to be incident thereto, the best and most improved rent or rents that can reasonably be had and obtained for the same, without taking any fine, foregift, or income in respect of the making thereof, and so that none of the lessees shall be made by any clause or words therein contained free from impeachment or exempted from punishment for committing waste, and so that in every such lease there be contained a clause in the nature of a condition of re-entry, in case the rent and rents thereupon to be reserved be behind and unpaid for the [*595] space of twenty-one days: provided always, *and it is my will and mind, that, in case any mortgage which now or at any time after my decease shall or may be charged upon all or any part of my said real estate shall be called in, and the moneys which shall have come to the hands of my said trustees and executors shall be inadequate and insufficient to pay and satisfy the same, then I do hereby order and direct and empower my said trustees and executors, or the survivors or survivor of them, or the heirs of such survivor to raise and levy, borrow and take up at interest, by way of mortgage or charge upon my said real estate, or any part thereof, such sum or sums of money as shall be necessary to pay and satisfy such mortgage or mortgages and the interest due thereon, and all costs, charges, and expenses incident to the calling in of, or borrowing money to satisfy, the same and every part thereof; and in order thereto, and for the purpose of perfecting such mortgage or mortgages, it shall and may be lawful to and for my said trustees and executors, and the survivors or survivor of them, and the heirs of such survivor, by any indenture or indentures to be by them or him sealed and delivered in the presence of and attested by two or more credible witnesses, to subject and charge my said real estate, which I hereby devise to them for that purpose, or a competent part thereof, to and with the payment of such sum and sums of money so to be borrowed as aforesaid, with interest for the same, so as the premises so to be subjected and charged as aforesaid be made redeemable on payment of the sum or sums of money so to be borrowed thereon, or on security thereof, and interest for the same: And I do hereby empower and authorize my said trustees and executors, and each and every of

them, to retain out of my personal estate, or the rents and profits of my said real estate, all such costs, charges, and expenses as they or any of them shall or may from time to time be put *unto in or about the [*596] execution hereby in them reposed, or in any wise incident thereto, together with an adequate and reasonable compensation and satisfaction for their and each and every of their trouble in or about the same; and it is my will and my mind, and I do hereby direct my said trustees and executors, by and out of the rent and profits of my said real estates, to educate my said nephew, John Wilson, so as to qualify him in their judgment for a tradesman and a man of business: And when and so soon as a sufficient sum of money shall be raised by all and every or any of the means aforesaid, to pay, satisfy, and discharge all my just debts, funeral expenses, the costs incident to the carrying of this my will into execution, the several sums of money by me hereinbefore given and disposed of, and the expenses of the education of my said nephew John Wilson, then I give and devise all my messuage, dwelling house or tenements situate at or near Dewsbury Moor, in the township of Dewsbury aforesaid, and at or near Fall Lane, in the said township, and now or lately in the several and respective occupations of John Noble, Nelly Oldroyd, Thomas North, George Wilson, William Tolson, John Chatless, David Batley, Widow Ellis, and Thomas Hemingway, and also two messuages or dwelling houses which I am now erecting or have lately built at Dewsbury Moor aforesaid, adjoining or near to the said messuage in the occupation of Thomas North, unto my niece Hannah Blakeley, the daughter of my late brother William Wilson, and her assigns, during the term of her natural life; and after her decease, then I give and devise the same and every part thereof unto and equally among her lawful issue and their several and respective heirs and assigns for ever: also, I give and bequeath unto my said niece, Hannah Blakeley, her executors, administrators, and assigns, the sum of 200*l.*, to be paid her by my nephews, John and William Wilson, in equal *shares and proportions out of the estates and property by [*597] me hereinbefore given and devised to them respectively, within twelve months next after they shall respectively come to the possession thereof: also I give and devise all those my estates, situate in the township of Dewsbury, called Pilgrim's Cottage, and the lands adjoining, including the allotment of newly inclosed lands, Squirrel Hall, and the lands thereto belonging, or adjoining, including the allotment of newly inclosed land, Maple Close, Shepherd's Close, &c., and also all that my colliery in Dewsbury aforesaid; subject nevertheless to the payment thereout of the same 100*l.* part of the sum of 200*l.* which I have hereinbefore given to my niece Harriet Blakeley, aforesaid, and also to the payment, within twelve months next after my said nephew John Wilson shall come to the possession of the property by me last above given to him as aforesaid, of the sum of 300*l.* which I hereby give and bequeath unto his sister Mary, to hold the said premises unto my said nephew John Wilson, and his assigns during the term of his natural life; and from

and immediately after his decease, then I give and devise the same unto his lawful issue, if more than one, equally, and their several and respective heirs and assigns for ever; but if my said nephew Joseph Wilson should happen to die without lawful issue, then I give and devise the said last mentioned estate and premises unto William Wilson, son of my nephew William Wilson, his heirs and assigns for ever; subject nevertheless and charged with the payment of the further sum of 300*l.* which I hereby give and bequeath unto Mary, sister of my said nephew John Wilson, to be paid to her within twelve months next after the said William Wilson, my great nephew, shall become entitled to the property hereby given and devised to him; also I give
[*598] and devise unto my nephew William all that *piece or parcel of land, situate at Dewgreen in Dewsbury aforesaid, which he purchased of me; and, subject to the receipt of the rents and profits thereof by my said trustees and executors for the purpose aforesaid, I give and devise unto my said nephew William all my messuages, buildings, lands and hereditaments situate at or near Dewsbury Moor aforesaid, and now or lately in the respective occupations of George Crawshaw, Benjamin Robinson, and Joseph Higham, or their respective under tenants; and also all that my close or parcel of land situate at or near Raven's Lodge, in Dewsbury aforesaid, and now in the occupation of John Honningway; and also all that my messuage and buildings, situate, at Dewsbury, and now or lately in the occupation of Joseph Carter, or his assigns, to hold the same unto my said nephew William Wilson, and his assigns, for and during the term of his natural life, subject nevertheless to the payment thereout of the sum of 100*l.* part of the said sum of 200*l.*, which I have hereinbefore given to my niece Hannah Blakeley; and from and after his decease, then I give and devise the same to his natural issue, if more than one equally, and their several and respective heirs and assigns for ever; and as to all the rest, residue and remainder of my real estate, situate in Dewsbury aforesaid or elsewhere I devise the same and every part thereof, subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid, unto and equally between my said nephews John and William Wilson, and their several and respective heirs and assigns for ever, as tenants in common, and not as joint tenants."

The question in the cause was, whether the sum of 585*0l.* in the will mentioned, was to be raised by sale or mortgage, or by annual rents and profits?

[*599] *Mr. *Pemberton* and Mr. *Kindersley*, for the plaintiff, contended, that the money, ought to be raised by sale or mortgage.

Mr. *Bickersteth* and Mr. *Garratt*, contra:—The argument consisted of a commentary on the different clauses of the will; and in the course of it the following authorities were cited: *Allan* v. *Backhouse*,(*a*) *Ivy* v. *Gilbert*,(*b*) *Evelyn* v. *Evelyn*,(*c*) *Codrington* v. *Foley*.(*d*)

(*a*) 2 Ves. & B. 65. (*b*) 2 P. Wms. 13. (*c*) 2 P. Wms. 659. (*d*) 6 Ves. 364.

June 14.—THE MASTER OF THE ROLLS :—Whether the 5850*l.* is to be raised out of annual rents and profits, or by sale or mortgage, is a mere question, of intention, to be collected from the context of the will, or from the purposes to which the money is to be applied. If those purposes require the immediate payment of the money, then it must be intended that the testator could not mean satisfaction by annual rents and profits, but by sale or mortgage.

The first direction here is, that the trustees are to convert the personal estate into money, and to sell the canal shares; and with and out of the moneys so to arise, and the rents, issues, and profits of the real estates, to pay a legacy of 50*l.* and an annuity of 100*l.*, and the testator's funeral expenses and debts. Inasmuch as debts can be immediately claimed,—to the extent of this purpose, if necessary, a sale or mortgage might certainly be made. The testator proceeds to direct the trustees, in the next place, to raise and levy, by and out of the rents and profits of his real estate, the sum of 5850*l.*, and to place the *same out at interest upon some eligi- [*600] ble security; and he then apportions this sum between different legatees, giving life interests to many of them, with remainders over to their children; and if the subsequent part of the will did not afford a different construction, it might be inferred, from the circumstance of his giving life estates, that he meant the money immediately to be raised, because the delay attending the accumulation of the sum by rents and profits, might altogether defeat the intention of his bounty to the legatees for life. He proceeds however, to direct, that, in case any of his legatees shall happen to die before the legacies given to them shall be raised and paid, and shall leave lawful issue, the issue shall enjoy the benefit intended for the parent. He is not to be understood here as speaking of a death of a legatee in his lifetime, but of a death at any subsequent period before the legacy is paid; and an inference arises that he considered some time must elapse before the legacies would be raised, which is hardly consistent with an intention that the 5850*l.* shall be immediately raised by sale or mortgage. He afterwards authorizes and empowers his trustees to grant leases of all or any part of his real estate; and, in case any mortgages, which he had made or might make of his real estate, should be called in, to levy, borrow, and to take up at interest, by way of mortgage, the sums necessary to pay and satisfy such mortgages, and all interest due thereon, and the observation here arising is, that he intended to preserve all his real estate, and that he did not mean that his trustees should have power to sell any part of his real estate, even for the purposes of paying off mortgages; and that whenever he intended that they should have a power to mortgage, he expressed it in direct terms. He next authorizes his trustees to retain their costs, charges, and expenses out of his personal estate, or the rents and profits of his real estate; *and by and out of the [*601] rents and profits of his real estate to educate one of his nephews; and it is plain that, by the term "rents and profits," in the cases, he meant annual rents and profits. He then states, that, when a sufficient sum of

money is raised by all and every or any of the ways and means aforesaid, which is by the application of his personal estate, and the rents and profits of his real estate, to discharge all his just debts, funeral expenses, and the several sums of money by him before given, he devises a certain real estate to his niece and her issue; and this points not to an immediate devise, but to a devise which is to take effect at a future or postponed period. He then gives to the same niece a sum of 200*l.* to be paid by his two nephews, John Wilson and William Wilson, within twelve months after they shall respectively come into possession of estates thereinafter given to them; and he gives another legacy of 200*l.* to be paid by John Wilson to his sister within the same period of twelve months. The time fixed for the payment of the legacies by the nephews plainly imports a postponed possession of the estates devised to them. Subsequent legacies are given on the same terms. He then devises to his nephew William a certain estate, "subject to the receipt of the rents and profits thereof by his trustees and executors for the purposes aforesaid;" and as to the rest, residue, and remainder of his real estate, he devises the same, "subject to the receipt of the rents and profits thereof by his trustees and executors for the purposes aforesaid," to his nephews, John and William Wilson, and their heirs.

The two last devises, added to the observations before made, appear to me to leave no doubt that the purposes of the trust were to be satisfied out of the annual rents and profits, and not by sale or mortgage; and the declaration of the court must be accordingly.

[*602] *Watson v. The Duke of Wellington.

1830; June 14, 15.

In order to constitute an equitable assignment there must be an engagement to pay out of the particular fund.

The plaintiffs were the executors of Mr. Sims, who had advanced a large sum of money to the Marquis of Hastings, on the joint bond of the marquis and a surety. The sum due on the bond exceeded 9000*l.*

Towards the end of 1825, the marquis having returned from India to England, the plaintiffs made repeated applications to him for the payment of the debt. The marquis represented that he was about to receive a large share of the Deccan prize money; promised that their demand should be paid out of that fund; and begged that, in the mean time, no proceedings might be taken against him or the assets of his surety. On the 6th of February, 1826, Mr. Allen, the solicitor of the plaintiffs, again waited on the marquis; who then stated that he had directed Colonel Francis Doyle, whom he had empowered to receive his share of the prize money, to pay the debt and costs due to the executors of Mr. Sims; and at the same time his lordship wrote, and delivered to Mr. Allen, the following letter, addressed to Colonel Doyle:—

"*February* 6, 1826.

"My dear Friend,

"As I shall leave to you the distribution of the prize money, as soon as it shall be issued for me, I have to mention that the executors of Mr. Sims are claimants on that fund for a bond debt with interest.

"Faithfully yours,

"HASTINGS.

"To Colonel Francis Hastings Doyle."

*Mr. Allen shortly afterwards showed the order to Colonel Doyle, [*603] who then stated, it would be necessary to send him, through the solicitor of the marquis, the particulars of the demands of Sim's executors.

The bill insisted, that this letter, more especially when connected with the before mentioned promises and assurances by the marquis, amounted to an equitable assignment of so much of the prize money, as would be sufficient to satisfy the bond debt. It charged, and the evidence proved, that the marquis represented his share of the prize money as an unincumbered fund; that he promised that the debt should be paid out of it; and that, on the faith of his representations and promises, the plaintiffs, at his request, abstained from taking legal measures against him and his surety.

The question was, whether the plaintiffs had any lien on the fund?

Sir *Charles Wetherell* and Mr. *J. Russell*, for the plaintiffs:—The letter, taken by itself, is sufficient to create an equitable charge. It is addressed by the marquis to the person who is to have the disposition of the prize money; and it states that the plaintiffs are claimants on the fund. How could they be claimants on the fund in respect of their bond debt, unless the debt were to be thrown on the fund? As general creditors of the marquis, they could have no claim on the fund. The words imply, if they do not expressly declare, that the debt is to be a claim on the fund; that is, that whatever shall be found due in respect of the bond debt shall be paid out of this particular fund. Can it be seriously believed, that this letter was by any party meant or understood to *be nothing more than an intimation to [*604] Colonel Doyle that the plaintiffs were creditors of the marquis; and that the Colonel, when the prize money came into his hands, was to advert to this circumstance, and was to pay their demand or not to pay it, according as his discretion or caprice might dictate?

But if any doubt can be raised as to the import of the letter, considered by itself, the doubt must vanish, when we look at the circumstances which preceded and accompanied the delivery of this document. The marquis promised that this debt should be paid out of the prize money; it was with reference to that promise, and with a view to give a security, that the letter was delivered to the solicitor of the plaintiffs; and on the faith of this promise, and resting on this security, the plaintiffs omitted to pursue their legal remedies. Writing is not necessary to create a trust of personal pro-

perty. *Bayley* v. *Boulcott.*(*a*) The circumstances of this transaction, even if the letter did not exist, would be sufficient to create a charge upon the fund, *Stuart* v. *Kirkwall.*(*b*)

Mr. *Pemberton*, Mr. *Kindersley* and Mr. *Fane*, for defendants, claiming to be mortgagees of the fund.

Mr. *Bickersteth* and Mr. *G. Richards*, for the administratrix of the marquis :—Even if the fund had been in the hands of Colonel Doyle, a mere direction to him to apply a part of it in satisfying a particular debt, would not create a lien in favor of the creditor to whom that debt was owing. [*605] *Ex parte Heywood*,(*c*) *Williams* v. *Everett*,(*d*) *Ex parte* *South.*(*e*) Here the fund was not in the hands of Colonel Doyle, and, in fact, he never received any part of it. There was nothing to hinder the marquis from directing that his prize money should be paid to another person; and it is clear that the present plaintiffs could not have claimed a lien on it in any hands except those of Colonel Doyle.

The *Solicitor General* (Sir E. B. Sugden) for the crown.

Mr. *Spence*, Mr. *Wright*, and Mr. *Wray*, for other defendants.

THE MASTER OF THE ROLLS :—In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund.[1] I am not at liberty to conjecture what might have been the intention of the parties,

(*a*) 4 Russ. 345. (*b*) 3 Madd. 387. (*c*) 2 Rose, 355.
(*d*) 14 East, 582. (*e*) 3 Swanst. 392.

[1] In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund. So, A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C. by letter to C. promised that he would direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankruptcy issued against A. under an act of baukruptcy committed while his letter was on its way to B. and the goods were delivered by B. to D. in ignorance of the bankruptcy. It was held that C. had a good title in equity to the goods. *Burr* v. *Carvalho*, 4 Myl. & Cr. 690. "It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. On the other hand, this doctrine has been brought into doubt by some decisions in the courts of law, which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions; but is certainly not the doctrine of this court." Lord Eldon, *Ex parte Smith*, 3 Swanst. 393. Where a superintendent of the poor, who had claims against the county for his services and advances sold to various persons to whom he was indebted, specific portions of such claims, in payment of such debts, and agreed to give orders in their favor for the same when their claims were allowed, it was held that such creditors obtained a valid lien upon the fund. *Richardson* v. *Rust*, 9 Paige, 243; and see *Hawley* v. *Ross*, 7 Paige, 103. But a covenant by a debtor to pay certain debts owing by him out of a designated fund when the same shall be received by him, cannot be construed into an equitable mortgage of the fund, so as to give the creditors a specific lien therein, such covenant being merely personal. *Rogers* v. *Hosack's executors*, 18 Wend. 319, reversing S. C. 6 Paige, 415. As to the necessity of notice of the assignment to the debtor or party holding the fund; *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, id. 33; *Cooper* v. *Fynmore*, id. 60; *Foster* v. *Blackstone*, 1 Myl. & K. 297; *Malcolm* v. *Charlesworth*, 1 Keen, 72; *De Tastet* v. *Tavernier*, id. 169, and note ibid; *Foster* v. *Hargreaves*, id. 281, 287; *Timson* v. *Ramsbottom*, 2 Keen, 35; *Gregory* v. *West*, 2 Beav. 541; *Williams* v. *Thorp*, 2 Sim. 257; *Douglas* v. *Russell*, 4 Sim. 524; *Greening* v. *Beckford*, 5 Sim. 195; *Jones* v. *Jones*, 8 Sim 633; *West* v. *Reid*, 2 Hare, 255.

except as it is to be collected from the expressions of the letter; and, giving to the words of the letter their natural signification, I cannot there find any engagement on the part of the Marquis of Hastings to pay the debt out of this money:—"As I shall leave to you the distribution of the prize money, I have to mention that the executors of Mr. Sims, are claimants upon it." The natural import of the words is not a direction to Colonel Doyle to pay the debt, but an intimation that the executors of Sims are claimants upon that fund, of which the marquis means to leave the distribution to the discretion of Colonel Doyle. The bill must, therefore, be dismissed.(*a*)

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*Dawson *v.* Hearn. [*606]

Rolls.—1830; June 16. L. C. 1831; July 25, August 8.

Where a testator directs a government annuity of a certain amount to be purchased for his wife within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity.

Thomas Hearn, by his will, after giving among other legacies, 300*l.* to his wife, bequeathed as follows:—I also direct, that, from and out of my moneys and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a government annuity of 250*l.* per annum, in the name and for the use of my wife during her life; and I further will and direct that, in case my personal estate shall prove insufficient to purchase, and pay and satisfy, the annuities and several pecuniary legacies hereinbefore by me directed and given, I charge and make subject my estate at Singleborough with and to the deficiency therein. All the rest and residue of my personal estate, not hereinbefore my me given and disposed of, I give to my brother, William Hearn, to be disposed of among his children and grand children, as he may think fit; and I nominate and appoint my brother Williaw Hearn, and nephew Thomas Hearn, executors of my will."

He died on the 28th of April, 1827.

The wife, Susannah Hearn, died on the 28th of November, 1827, before any annuity had been purchased, or any payments in respect of it made to her.

The bill was filed by the personal representative of the wife, claiming the sum which would have been necessary to purchase the annuity, if the direction in the testator's will had been followed.

*The executors stated in their answer, that, at the death of the [*607] testator, the assets consisted principally of money out on securities, which could not be immediately gotten in: that, at the end of three months

(*a*) *Yeates* v. *Groves*, 1 Ves. jun. 280. *Ex parte Scudamore*, 3 Ves. 85. *Ex parte Smith*, 6 Ves. 446. *Ex parte Alderson*, 1 Madd. 53.

from the testator's death, they had not possessed assets sufficient to purchase the annuity; that the funds were then very high, and the health of Susannah Hearn very precarious: that the defendant, Thomas Hearn, who principally acted in the executorship, informed Susannah Hearn of his intention to postpone the purchase of the annuity; and told her, he doubted not that she would feel satisfied with the security of William Hearn, his father, and himself, as the executors of the testator, for the payment of the annuity in the mean time; to which she made no objection: that it was never considered by them, or either of them, that Susannah Hearn was, or could be, entitled to the principal sum required for the purchase of the annuity, or any part thereof; and that Susannah Hearn never made any demand of any principal sum in respect of such annuity.

Mr. *Bickersteth* and Mr. *Swanston*, for the plaintiff:—Where there is a bequest of an annuity, the legatee may take either the annuity, or a gross sum equal to the price of the annuity. *Yates* v. *Compton*,(*a*) *Barnes* v. *Rowley*,(*b*) *Bayley* v. *Bishop*,(*c*) *Palmer* v. *Crawfurd*;(*d*) and the principle of these authorities was recognized in a late case of *Brown* v. *Ross*. The widow of this testator had a right to the value of this annuity; and, as the annuity was not purchased, her representatives are entitled to receive the sum by which that value is represented.

[*608] *Mr. *Pemberton* and Mr. *Turner*, contra:—In the cases cited, the bequest was, not simply of an annuity, but of a gross sum to be laid out in the purchase of an annuity. In this will there is no mention of any gross sum. The widow had a right merely to an annuity; and though she might have insisted on receiving a gross sum in lieu of it, she never availed herself of the power to make such an election. She never claimed any thing except as an annuity; and her personal representatives cannot alter the form and nature of her claim.

The Master of the Rolls:—There is no difference in equity between the gift of a sum certain, to be invested in the purchase of an annuity, and the direction that, at a given time, a government annuity of a certain amount is to be purchased. The amount of both gifts is equally certain; and this court has considered it to be equivalent to a personal legacy of a certain sum of money, because, when purchased, the annuitant may immediately sell the annuity. If the annuitant think fit, she may waive the purchase of the annuity, and may elect in lieu to receive the annual payment from the executor or residuary legatee; and this is the reason why, in a late case,(*e*) where the annuitant for many years had received her annuity from the executor, I referred it to the master, to inquire under what circumstances, and for what reason, the purchase of the annuity had been delayed.

In the present case, it is not pretended that the wife had waived her right

(*a*) 2 P. Wms. 308. (*b*) 3 Ves. 305. (*c*) 9 Ves. 6. (*d*) 3 Swans. 482.
(*e*) The Master of the Rolls referred here to *Brown* v. *Ross*. [Taml. 469, n. a.]

to the purchase of the annuity, though, at the request of the executors, she had *consented to postpone it. At the time of her death she [*609] retained the right to have the adequate sum invested; and her executor is now entitled to claim it as a part of her personal estate.

By the decree it was referred to the master, to inquire what sum would have been required, at the expiration of three months, from the decease of the testator, to purchase a government annuity of 250*l.* during the life of Susannah Hearn; and it was declared, that the plaintiffs were entitled to that sum, together with interest thereon at the rate of 4 per cent. from the end of the three months.[1]

The defendants appealed from his honor's decree.

1831; *July* 25.—Sir *Edward Sugden* and Mr. *Swanston*, in support of the decree:—The cases of *Palmer* v. *Craufurd*,(*a*) and *Bayley* v. *Bishop*,(*b*) decide the present question. The latter, indeed goes a great deal farther: for there a sum of money was to be laid out in an annuity for a son, after the death of his mother; and although the mother outlived the son, so that the time for making the investment never arrived, the money was directed to be raised and paid to his representative. If Mrs. Hearn had survived her husband but a single hour, her executor, upon the principle of that case, would be entitled to the value of this annuity. In point of fact, however, the period limited for the investment expired before Mrs. Hearn's death; and though she consented to a postponement *of the purchase with [*610] a view to accommodate the defendants, they cannot be permitted to derive a contingent advantage from that circumstance, since it is not pretended that she ever abandoned her right. The only distinction suggested that here the thing given is an annuity of a certain amount, and not a fixed sum for the purchase of an annuity, is merely nominal, and was exploded in *Yates* v. *Compton* (*b*) As soon as the prescribed period had elapsed, the bequest became as much ascertained, or by a reference to the government tables ascertainable, as if its amount had been specified in the will. If this had been an annuity bequeathed to a stranger for the life of the widow, and the latter had died after the three months, but before the investment was made, could it be seriously argued that the legatee should lose the value of his legacy? What difference can it make, that here the annuitant and the *cestui que vie* are one and the same person?

Mr. *Pepys* and Mr. *Turner*, for the executors:—The substance of the gift here is an annuity of a stated amount, and not as in the ordinary cases, an ascertained sum. The intention of the testator, as is shown by the bequest

(*a*) 3 Swans. 482. (*b*) 2 P. Wms. 308. (*c*) 2 P. Wms. 308.

[1] See another report of this case, before the Master of the Rolls, Sir John Leach, Taml. 465.

of 300*l.* till the annuity should be purchased, was to secure to his widow a competent provision for her declining years,—not to put into her hands a sum so gross, which she might squander and mismanage, or which might go eventually to her own relatives. There is nothing improper or illegal in that intention; and although the widow might perhaps have defeated it by signifying her election to the contrary, and demanding the value of the annuity in money, she has not attempted to do so. The *obiter dictum* of [*611] Lord King in *Yates* v. *Compton*, goes only to the extent *of allowing the annuitant an option; the case itself decided nothing, for the report does not state in what right the money was decreed, and Jane Styles, whom the plaintiff represented, was the legatee both of the annuity and the residue. There is no law which declares that a testator may not restrict his bounty to a mere annual provision, or which releases his executors from the obligation to carry that purpose strictly into effect, provided he has expressed it in distinct and imperative terms. Doubtless the legatee of an annuity, who is *sui juris*, may sell it the day after it is bought; but the trouble and loss attending a sale will, in general deter him from such a step; especially if the annuitant be an elderly female, to whom a comfortable maintenance, well secured, is far more valuable than any price she could obtain. The cases referred to have all proceeded upon the principle of there being a gross sum given; which, being ascertained by the testator himself, the legatee is permitted to deal with at his pleasure. That distinction is expressly taken in *Barnes* v. *Rowley*.(*a*) If the legatee of an annuity be a bad life, are the executors to have no discretion with regard to the time and mode of securing the annuity? May they not by arrangement with the legatee, and for the benefit of the estate, provide for its payment in a different way, or postpone the investment till a more advantageous opportunity; or must they at all events, and at whatever cost, at once set apart and invest the price?

1831; *August* 8.—The Lord Chancellor.(*b*)—Upon the authority of the cases which have been cited, particularly *Yates* v. *Compton*,(*c*) I am [*612] of opinion *that the absolute interest in this annuity vested, at the decease of the testator, in the widow. The widow had a right to have the annuity purchased, and her personal representatives have the same right. The executors ought to have bought it within three months; and they cannot say that she shall be placed in a worse situation, because they have not done their duty (for she did not die, till after the three months had elapsed,) than she would have been in, had they done what they ought to have done. It is said that, in *Palmer* v. *Craufurd*,(*d*) and *Bayley* v. *Bishop*,(*e*) there was a bequest of a specific sum, with a direction appended to lay it out in the pur-

(*a*) 3 Ves. 305. (*b*) Lord Brougham. (*c*) 2 P. Wms. 308.
(*d*) 2 Swans. 482. (*e*) 9 Ves. 6.

chase of an annuity. In the first place, *Yates* v. *Compton*,(c) (which is the earliest case upon the point) is not open to that observation; for there the testator directed his executors to sell certain lands, and with the money arising from the sale, and the surplus of his personal estate, to purchase an annuity of 100*l.* for the life of Jane Styles; and the overplus also of the personal estate was to go to Jane Styles. That is a case, therefore, which is not liable to the observation by which it is sought to distinguish the present case from the others, because it is not a bequest of any specific sum; the sum to be paid for the annuity is not specified; what is specified is the amount of the annuity which is to be bought. It is true there is a circumstance in that case which does not occur here: for there the residue was given to the same person who took the annuity, which might make some little difference in the argument. But that observation does not apply to *Palmer* v. *Craufurd*, or *Bayley* v. *Bishop*, or *Barnes* v. *Rowley*. In *Palmer* v. *Craufurd*,(b) 3000*l.* was given to two trustees to purchase an annuity of 300*l.* for the life of G. Craufurd, in their own names, and to pay it to him half-yearly. The Master of the *Rolls held, that the only question was concerning the [*613] effect of some correspondence, as evidence of his having elected to take a benefit under the will in another way, and not by way of annuity. In *Barnes* v. *Rowley*,(c) the words were, "I bequeath to Mary Steele 250*l.*, which I have in the 5 per cents., to be laid out in an annuity for her life." Mary Steele, before the death of the testator, a few hours after the will, had attempted to commit suicide, and she effected that purpose two days after his decease. These were very strong circumstances to show the probable intention of the testator to give her a life interest by way of annuity only. A deranged person, seeking to destroy herself, was evidently not to be trusted; and one can hardly avoid importing that consideration into the case. Nevertheless, Lord Loughborough made use of expressions, which clearly exclude the operation of the argument, by which it is sought to found the doctrine of these cases upon the circumstance of there being a gift of the sum, and not a mere direction to lay it out in the purchase of an annuity. He asks, "Could I have prevented her from selling the annuity the next day," during the two days the unfortunate woman survived the testator? The answer must be, No. Then she, or her personal representatives, had a right to the same benefit, as if the annuity had been purchased during her life; and he adds, "The interference of the court against the will of the legatee, to compel the laying out the money in an annuity for a person, her own mistress, would have been perfectly nugatory and vain. The executor can never benefit by it. I cannot raise a doubt upon it."

All these cases, appear to have gone upon the principle, that it is not material whether a testator gives *a sum of money, and directs it [*614] to be laid out in an annuity, or gives a general direction to his execu-

(a) 3 P. Wms. 308. (b) 3 Swans. 482. (c) 3 Ves. 305.

tors, to lay out so much money as will be sufficient to buy a given annuity. In *Barnes* v. *Rowley* the annuity was considered to have been vested from the death of the testator; and I can see no difference between giving a sum of money to be vested in an annuity, to be paid half yearly to A. B., and ordering the executor to lay out so much money as shall be sufficient to buy for A. B. an annuity of a certain amount.[1]

The judgment of the Master of the Rolls must be affirmed.(*a*)

Bourn *v.* Gibbs.[2]

1831; June 19.

A testator gave to his wife the residue of his personal property, with a proviso, that if not disposed of by her in her life or by her will, it should go over. It passed, as part of her property, by her will, although not specifically noticed.

The residuary clause of the will of Richard Claringbould was in the following words:—"Also I give and bequeath the sum of 200*l.* of like lawful money, and also the sum of 1000*l.* stock, residue of my capital stock, in the old joint stock of south sea annuities, and also 200*l.* of capital stock in the three per cent. consolidated bank annuities, and also all the rest and residue of my goods, chattels, effects, debts due and owing to me, money, securities for money in any of the public stocks or funds of the kingdom, and all other my personal estate whatsoever and wheresoever, and of what kind soever the same may be, at the time of my decease, (from and after the payment of all my just debts, funeral expenses, the legacies before mentioned, and the legacy [*615] *of 5*l.* hereinafter bequeathed to my executor John May, hereinafter mentioned, and the charges of proving and executing this my will) unto my wife Elizabeth Claringbould, to and for her own use and benefit, and to be at her own absolute disposal, and free from any control whatsoever; provided nevertheless that if my said wife shall make no disposition thereof, either by expenditure, sale, transfer, assignment, gift, or otherwise in her life-time, or by her last will and testament, then I direct that the said several sums of 200*l.* lawful money, and 1000*l.* in the old south sea annuities, and 200*l.* stock in the three per cent. consolidated bank annuities, and residuary personal estate, after such payments thereout as aforesaid, or such part thereof as shall remain undisposed of as aforesaid, shall, immediately after my wife's decease, go to, and I accordingly will and bequeath the same, unto my two nephews Peter John Saunders and Thomas Saunders, and my said niece

(*a*) *Woodmeston* v. *Walker*, post.

[1] Vide *Blewitt* v. *Roberts*, Cr. & Ph. 274. S. C. 10 Sim. 491. *Bradhurst* v. *Bradhurst*, 1 Paige, 231. *Hawley* v. *James*, 5 Paige, 321. *Tweedale* v. *Tweedale*, 10 Sim. 453, The bequest of an annuity created *de novo* requires words of limitation to be annexed to it, in order that more than a life interest should pass, unless the bequest contains a reference to a particular fund. *Heron* v. *Stokes*, 1 Conn. & Law. 270. Whether legacies of annuities are distinguishable from other legacies, see *Page* v. *Adam*, 4 Beav. 283.

[2] S. C. Taml. 414.

Ann Gibbs, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns."

The widow made her will, in which there was no reference or allusion to her husband's will; and she thereby disposed of all her personal estate to other persons than those who were named in her husband's ultimate residuary bequest. A sum of stock, which was part of the testator's property given to the wife, remained in his name at the widow's death; and the question in the cause was whether this passed by her will?

Mr. *Bickersteth* and Mr. *Barber*, for the plaintiffs:—The residuary estate of Richard Claringbould became his wife's absolute property; and it passed by her will as part of her assets. *Bull* v. *Kingston*,(*a*) [*616] *Attorney General* v. *Hall*,(*b*) cited with approbation in *Wynne* v. *Hawkins*,(*c*) *Bland* v. *Bland*.(*d*)

Mr. *Pemberton* and Mr. *Farrer*, contra:—The wife had undoubtedly a power of disposing of the stock in question, either by applying it to her own use, or by making an appointment; but if she did not dispose of it, the testator gave it to his nephews. He did not mean that it should be part of her general assets; her interest was to cease with her life, unless she spent the fund or made an express disposition of it; and if the will, which she has made, does not contain any reference to her authority, or to this specific fund, it cannot be deemed an execution of her power.

The Master of the Rolls was of opinion that the widow took an absolute interest in the whole of the testator's residuary estate, and that the stock in question did pass by her will.[1]

(*a*) 1 Mer. 314. (*b*) Fitzgibb. 314. 2 Eq. Ab. 293. (*c*) 1 Bro. C. C. 179.
(*d*) 2 Cox, 349. See also, on this point, *Lightburne* v. *Gill*, 3 Bro. P. C. 250, Toml. ed. *Upwell* v. *Halsey*, 1 P. Wms. 651, and the cases referred to in the notes.

[1] A testator by his will, directed his trustees "to raise 5000*l.* for his daughter," and to invest "his daughter's said legacy," and pay the interest to her for life, for her separate use, and not to be under the control of any husband, with remainder to her children absolutely, and he gave her the power of appointing a life interest to her husband. The will contained no ultimate limitation of the property, but charged the legacy on the real estate in case of a deficiency of the personalty. It was held, that subject to the interests given to the children, the daughter took an absolute interest, and having died unmarried, that her personal representatives were entitled thereto. *Mayer* v. *Townsend*, 3 Beav. 443. And see *Comber* v. *Graham*, ante, 450. *Wood* v. *Richardson*, 4 Beav. 174. *Pratt* v. *Church*, id. 177. *Hulme* v. *Hulme*, 9 Sim. 644.

[*617] *KINSMAN *v.* KINSMAN.

ROLLS.—1830; June 17. L. C.—1831; August 2, 3, 4, 23.

In a creditor's suit, the debts and costs were paid by the sale of one of two devised estates, and the court directed the master to settle the proportion which was to be borne by the other devised estate: the devisee of the first mentioned devised estate was entitled for life only; and, he being an ignorant person and a day laborer, no proceedings were had under this direction for twenty-six years, at the end of which time the other devised estate was sold. The year following the tenant for life died, and his son, who was entitled in remainder, filed a bill to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs; and a decree was made by the Master of the Rolls accordingly, upon the ground of *lis pendens*, which was held to amount to equitable notice of the charge.

On appeal the decree was reversed by the Lord Chancellor, on the ground that there was no *lis pendens* at the time of the purchase.

THE testator, who died in 1780, by his will devised an estate, called Sandy Park, to William Kinsman for his life, with remainder in tail to his son, the present plaintiff, then an infant: and another estate called the manor of Northwood, to the defendant, Simon Kinsman, for life, remainder in tail to his son, who was another defendant. After the death of the testator, a creditor's bill was filed for establishing the will and administering the estate; and by the decree made on the 23d of May, 1792, after directing the usual accounts of the personal estate, it was ordered, that, if the personal estate were insufficient for the payment of the debts, the two estates of Sandy Park and Northwood should contribute thereto in proportion to their respective values. On the 19th of February, 1798, the cause came on for further directions upon the master's report, which ascertained a considerable deficiency of the personal estate for payment of the debts, and the two estates were ordered to be sold. In pursuance of that order the Sandy Park estate was sold for 3400*l.*; but, Simon Kinsman having placed the title deeds of the Northwood property in an iron pot, and buried them in his garden, no title could be made to that estate, and it remained unsold. On the [*618] 13th of March, 1798, the cause came on again for *further directions, when the debts and the costs of the suit up to that hearing were ordered to be paid out of the 3400*l.*, and it was referred to the master to settle the proportion of the debts and costs which ought to be borne by the Northwood estate. The whole of the sum of 3400*l.* was exhausted in the payment of debts and costs, except the sum of 390*l.*; and the master reported that the sum of 873*l.* 1*s.* 8*d.* was the proportion of the debts and costs which ought to be borne by the Northwood estate. An order was also made for laying out the sum of 390*l.* in three per cent. consols, and for the payment of the dividends to W. Kinsman during his life.

William Kinsman was a poor and ignorant man, who gained his livelihood as a day laborer; and no futher proceedings were had in the cause until after his death, which happened in February, 1825, when the solicitor employed

by the present plaintiff, upon an application to the court for the payment to the plaintiff of the sum of 390*l.*, became apprized of the facts of the case; and, about the same time, he discovered that Simon Kinsman and his son had in the year 1824, joined in a sale of the Northwood estate to a Mr. Fortescue for the sum of 2700*l.*, who afterwards conveyed it to his son, one of the defendants.

The present was a supplemental suit for the purpose of having the sum of 873*l.* 1*s.* 8*d.* with interest and costs raised out of the Northwood estate.

Mr. *Pemberton* and Mr. *Daniell*, for the plaintiff.

Mr. *Tinney* and Mr. *Parker*, for the defendants Simon Kinsman and his son.

Mr. *Bickersteth* and Mr. *Kindersley*, for Mr. Fortescue:—*The [*619] defendant Fortescue put in a plea of purchase for valuable consideration without notice, to which the plaintiff replied: no evidence was entered into in support of the plea.

Several questions were raised in the course of the argument, but the point principally discussed, and upon which alone the judgment turned both at the rolls and in the court above, was, whether there had here been a *lis pendens* of such a nature as to affect the purchaser with equitable notice. Upon that point the following authorities were referred to: *Worsley* v. *Earl of Scarborough*,(*a*) *Gore* v. *Stacpole*,(*b*) *Style* v. *Martin*,(*c*) *Sugden's Vendors and Purchasers*.(*d*)

The Master of the Rolls decreed that the sum of 870*l.* 1*s.* 8*d.*, with interests and costs should be raised; stating, that, at the time of the sale to Mr. Fortescue, there was plainly a *lis pendens*, which amounted to equitable notice of the charge, and that, but for the sale, which made a supplemental bill necessary, he would now have ordered the charge to be raised out of the Northwood estate, upon an application in the original suit.[1]

1831; *August* 2, 3, 4.—The defendant, Fortescue, appealed from that decree.

Mr. *Pepys* and Mr. *Daniell*, for the plaintiff.

The *Solicitor General* (Sir *W. Horne*,) Sir *E. Sugden*, and Mr. *Kindersly*, for the appellant.

*In support of the decree it was argued, that, as Mr. Fortescue [*620] had bought the Northwood estate during the pendency of a suit, in which it had been declared chargeable with the sum now sought to be recovered, he must be considered, in equity, as having had constructive notice. There was no pretence for saying that at the time of his purchase the cause was at an end. The report of the master ascertaining the amount of the

(*a*) Atk. 392. (*b*) 1 Dow, 30. (*c*) 1 Ch. Ca. 150.
(*d*) 735—8, 7th ed., where all the cases are considered.

[1] See another report of the case before the Master of the Rolls, Taml. 399.

charge had been regularly confirmed, but no final decree, directing the money to be raised, had ever been pronounced. The surplus produce of the other estate, which had been administered in the same suit, remained in the custody of the court, and, under orders made in the cause, the dividends were payable to the tenant for life, till his death in 1825, a period subsequent to the date of the purchase. Indeed, the Master of the Rolls had intimated that, but for the transfer of interest occasioned by the sale, he should have felt no difficulty in ordering the charge to be raised upon a petition in the original suit, without the expense of a supplemental bill. The existence of a *lis pendens* was therefore unquestionable; and it was scarcely conceivable how the purchaser or his advisers, if they had used reasonable diligence in investigating the title, could have failed to discover the fact.

On the other side, it was contended, that, if this were to be considered as constituting *litis pendentia*, half the lands in the kingdom would be placed *extra commercium*; since, in a large proportion of suits instituted for the administration of assets, and under which charges might eventually be established against real estate, no final decree was ever made; but as soon as their immediate number was attained, the *actors* declined to prosecute them farther. In the present instance, after the creditors, who proved their [*621] debts, had obtained a decree for payment *they had no motive in proceeding; and the suit was of course suffered to go to sleep. In common understanding, and for all practical purposes, a cause was absolutely determined, when the object had been accomplished for which it was originally commenced. It was nothing to the plaintiff or to the public what equities the court might afterwards see fit to administer between the different defendants. In strictness there could be no *litis pendentia* between co-defendants. The order made in 1792, or at all events that in 1798, was, therefore, really the final decree; but if it were otherwise, the circumstances which had occurred since, the laches of the parties, the undisputed transfer of the property, and still more, the leaving the defendant Simon Kinsman in the undisturbed possession of the Northwood estate, thereby enabling him to commit a fraud upon the purchaser, were tantamount to an abandonment of the suit. And yet, according to the plaintiff's argument, no length of time, not fifty years, or a century, would be sufficient to destroy the *litis pendentia*, unless a decree were pronounced, formally dismissing the cause out of court, a decree which, in practice, never was made, and which it was nobody's interest to ask. Such a doctrine was absurd in principle, and would be most mischievous in its operation. Lord Bacon, in his twelfth rule,(a) laid it down, that *lis pendens* cannot affect a purchaser, unless it be closely and vigorously prosecuted.

(a) Beame's Orders, p. 7.

In addition to the authorities cited in the court below, *Bishop of Winchester* v. *Paine*,(*a*) was referred to.

August 25.—THE LORD CHANCELLOR, after stating the circumstances of the case, observed, that the single question *was,—not [*622] whether *lis pendens* was notice to a purchaser, for of that there could be no doubt,—but whether there was or was not a *lis pendens* in this case? He took it to be perfectly clear that, in order to constitute *litis pendentia*, there must be a continuance of *litis contestatio*; and without going so far as to say with Lord Bacon, that there must be a constant and vigorous prosecution of the suit, still something should be done to keep it alive and in activity. It was unnecessary to go through the authorities which had been adverted to, the rather, as, with the exception of *Worsley* v. *Earl Scarborough*, where Lord Hardwicke drew the acknowledged distinction between a pending suit and a decree, they would not be found to lay down any distinct principle upon the subject. He was ready to admit that a decree for an account in a creditor's suit would not determine a *lis pendens*. But when the proceedings went a great deal further than the account; when the cause had been referred to the master, to see what proportions of a given encumbrance two estates should respectively bear; when the master had made his report; when that report, unobjected to and unexcepted to, had been finally confirmed; when the whole of the equities between the parties had been adjusted and adjudicated upon; when every thing had been obtained under the decree which the suit had contemplated, and nothing remained but to carry the decree into effect, the case was most materially changed. After the decree, and before execution, it was not pretended that *lis pendens* could any longer exist. If that were in substance the case here, to what did the difference in form amount? It might be true, that no general decree had been made upon the cause coming back for further directions. And why was it so? In all probability because no farther directions were required; the rights of the parties having been ascertained and decided by the report, that report *confirmed, and still [*623] unappealed from, was in truth the final judgment in the cause. How many years had elapsed after that decree had been pronounced? Upwards of a quarter of a century; and matters might have gone on for a century longer, because nobody had any motive to interfere. If the supplemental bill were considered as growing out of the former suit, that might, in a certain sense, be held to be, and perhaps his honor had so held it, a continuance and prosecution of the original cause; but it would be an abuse of the plain meaning of the term *lis pendens* to apply it to a case like the present, where the supplemental bill was not filed, till after the sale had taken place.

Upon these grounds, his Lordship was of opinion that, at the time when the purchase was made, there was no *litis pendentia* of which the purchaser

(*a*) Ves. 194. *Sorrell* v. *Carpenter*, 2 P. Wms. 483, and the cases cited in the note.

was bound to take notice, and that the judgment of the court below ought, therefore, to be reversed.[1]

The other defendants, Simon Kinsman and his son, were served with the petition of appeal, but did not appear.

[*624] *Fosbrooke *v.* Balguy.[2]

1830; June 21.

The eighth of the new orders applies only to the case of exceptions, and if the plaintiff afterwards move to amend his bill, the defendant is entitled to an order for time to answer, according to the old practice.

Exceptions having been allowed to the defendant's answer, the master, under the authority of the eighth of the new orders, fixed a month's time for the defendant to put in his further answer.

The plaintiff two days afterwards (24th of April,) obtained, as of course, an order to amend his bill, and that the defendant should answer the amendments and exceptions together, but did not in fact amend the record, till a great part of the month had elapsed. The amended bill was filed on the 14th of May, and on the 7th of June, the defendant, having been served with the order to amend, obtained an order for a commission to take his answer to the amendments and exceptions, with six weeks' time to return the same.

The plaintiff now presented a petition to discharge the order for irregularity, on the ground that the defendant ought to have answered the amendments and exceptions within the month fixed by the master.

Mr. *Rogers*, in support of the petition.

Mr. *Campbell*, contra.

The Master of the Rolls:—The eighth order applies only to the case of exceptions. If a plaintiff afterwards amend his bill, the defendant is entitled to an order for time to answer according to the old practice. If [*625] it were otherwise, the *plaintiff, by delaying to amend, would deprive the defendant of the time allowed by the master to answer exceptions.

Petition dismissed with costs.

[1] A personal service of a subpœna, or what is equivalent to personal service, upon the defendant subsequent to the filing of the bill, is necessary to create a *lis pendens* as against a *bona fide* purchaser, of the subject matter of litigation, who has not actual notice of the suit. *Hayden* v. *Bucklin*, 9 Paige, 512. And see further as to *lis pendens*, *Murray* v. *Ballou*, 1 Johns. Ch. Rep. 566. *Hopkins* v. *M'Laren*, 4 Cow. 667. *Murray* v. *Blatchford*, 1 Wend. 583. *Coppin* v. *Gray*, 1 Yo. & Coll. C. C. 206, 208. *Griffith* v. *Griffith*, 1 Hoff. Ch. Rep. 153. Revised Statutes of New York, vol. 2. (2d ed.) p. 103. § 48.

[2] S. C. Taml. 433.

Propert v. Parker.

1830; June 21.

If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in this third person as "Mr. A. B. has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement.

This was a bill for the specific performance of a contract for the purchase of a leasehold house. The contract was written by the defendant, but was not signed by him. It stated the agreement in the third person, in the following form:—"Mr. Wilmot Parker has agreed," &c.

Mr. *Bickersteth* and Mr. *Girdlestone*, for the plaintiff.

Mr. *Tinney* and Mr. *Girdlestone*, junior, for the defendant.

For the defendant it was objected that the insertion of his name, in his own handwriting, in the beginning of the agreement, was not a signing within the meaning of the statute of frauds; and in support of the objection *Morison* v. *Tournour*(*a*) was cited.

The Master of the Rolls overruled the objection; observing that what the statute of frauds requires, is, that the party, who is sought to be charged, shall, by writing his own name, have attested that he has entered into the contract.[1]

The usual order of reference as to title was made.

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*Attorney General v. Christ's Hospital.[2] [*626]

1830; June 22.

Where an annuity is given to a charitable institution for ever upon a condition, and is once accepted and acted upon, it cannot afterwards be renounced at pleasure; although the gift is coupled with a direction, that, upon the neglect or refusal of the institution at any time to act upon the condition, the annuity shall be applied in another manner.

Mr. Guy, who was the founder of Guy's Hospital, in his will, after mentioning a charter of incorporation which he intended that charity should obtain,

(*a*) 18 Ves. 175. See Sugden's Law of Vendors and Purchasers, 87—90, (6th edit.) and the cases there cited.

[1] The following memorandum was made by Bridges, the vendor, in his own handwriting:—"July 26th, 1839, John Bleakley agrees with J. R. Bridges to take the property in Cable street for the nett sum of 248*l.* 10*s.*" It was held that the agreement was sufficiently signed by the vendor. *Bleakley* v. *Smith*, 11 Sim. 150. A memorandum made by the authorized agent of the party was as follows: "February 29th, bought for Isaac Clason, of B. & V., 3000 bushels of rye," &c.; it was held that the purchaser was estopped from saying that the contract was not duly signed. *Clason* v. *Bailey*, 14 Johns. Rep. 484. It is alleged by counsel, in the *Earl of Glengal* v. *Barnard*, 1 Keen, 781, that, "If the name be so inserted as to have the effect of giving authenticity to the instrument, it is immaterial in what part of the instrument it is found." The position is supported both by principle and authority. A holograph will, where the testator commences, "I, A. B. &c.;" without signature, is a familiar illustration. Statutory regulations have however made changes in this respect.

[2] S. C. Taml. 393.

made a bequest in the following words:—"Item, I give to the president and governors of Christ's Hospital in London, and their successors for ever, one annuity or yearly sum of 400*l.* to be paid by my said executors till such intended corporation shall be obtained and take effect, and then, by such intended corporation, or their treasurer for the time being; provided, nevertheless, and upon this condition, that my said executors, and such intended corporation and their successors, shall have liberty from time to time to nominate and put into Christ's Hospital aforesaid, yearly and every year for ever at Easter, or within six months after, such four poor children, boys or girls, whether orphans or otherwise, or the children of freemen of the city of London, or unfreemen, not less than seven, or more than ten years of age, as my said executors, or the said intended corporation and their successors shall think fit, with preference to my relations, as often as any such shall offer themselves; who shall be received into the said hospital, and have the maintenance and education thereof, and be continued therein in like manner as other children are maintained and educated in the said hospital; and my will is, that, in case and as often as the said president and governors of Christ's Church Hospital shall neglect or refuse to take in and maintain the said number of boys and girls to them nominated, and qualified as aforesaid, it shall be lawful to my said executors, and the said intended corporation, and they are hereby directed [*627] and desired to apply the said annual sum of 400*l.* to the *education and maintenance of such four poor children as aforesaid, in such other school or place, and in such other manner as they shall think fit."

The governors of Christ's Hospital accepted the legacy, and from the year, 1725 to the present time, complied with the annexed condition; but they now declined to do so any longer, contending that, by the true construction of the latter part of the bequest, they were not bound by the acceptance of the legacy to continue to act under it, but were at liberty to abandon the gift, together with the condition annexed to it, whenever they thought fit.

Mr. *Pemberton* and Mr. *Wigram*, for the relators:—The sum of 400*l.* a year is given to the governors of Christ's Hospital and their succession for ever; but it is given upon condition, that the governors of Guy's Hospital and their successors should have liberty, yearly and every year for ever, to put into Christ's Hospital four children, to be educated and maintained in the same manner as the other objects of that charity. The legacy could not be accepted in part and rejected in part: it could not be accepted for one hundred years and no longer: being accepted, it was accepted absolutely; and the governors of Christ's Hospital are therefore bound for ever by the condition. The direction for applying the annuity to the education and maintenance of an equal number of poor children in some other place, in case the governors of Christ's Hospital should neglect or refuse to admit them, does not give a right so to refuse or neglect.

Mr. *Bickersteth* and Mr. *Phillimore*, contra:—This is a bequest of a yearly payment, subject to a condition which is to be performed yearly;

and the *testator, contemplating that at some future time, the [*628] parties might deem the condition too burdensome and decline to comply with it, has, in that event, directed the yearly sum to be differently applied. It is not consistent with the language of the will to say, that the testator considered that the governors of Christ's Hospital, if they once accepted any of the yearly payments, were never to be at liberty at any future time to neglect or refuse to admit four boys yearly. The sum of 400*l.* a year is not at present sufficient to maintain four boys or girls yearly for the whole length of time during which each child, when once admitted, is entitled to remain on the foundation; and the extra expense must be provided for out of the other property of the charity. It is not likely, that the testator should have intended, instead of benefiting Christ's Hospital, to create an incumbrance on its funds; and such a purpose cannot reasonably be imputed to him.

The Master of the Rolls:—If the annuity were given to Christ's Hospital for such time only as they should continue to act upon the condition, then, indeed, they would be at liberty to retire from it at their pleasure. But here the annuity is given to them and their successors for ever; and, having once accepted it, they are for ever bound by the condition.(*a*) The latter part of the clause, which authorizes the executors or the intended corporation to apply the 400*l.* a year in another manner, if the governors of Christ's Hospital shall refuse or neglect to act under the condition, is not to be considered as authorizing that refusal or neglect, but as a collateral remedy to secure, at all events, the testator's charitable intention.

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*Garratt v. Niblock. [*629]

Rolls.—1830; June 22.

A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after taken wife.

The will of S. Richards, which bore date the 12th of September, 1821, and was not duly attested to pass real estate, after desiring that his wife should leave off shopkeeping, gave several pecuniary legacies, and proceeded in these words:—"I then give to my beloved wife all my household furniture, and to her own disposal; likewise I give to my beloved wife all my freehold property in the parish of Risely; all my money in the funds, mortgages, bonds, notes of hand, &c. for her own use during her natural life." After her decease the testator directed his freehold property, and his property in the funds, to be sold, and the produce to be divided among seven of his rela-

(*a*) *Attorney General* v. *Christ's Hospital*, 3 Bro. C. C. 165. *Attorney General* v. *Andrew*, 3 Ves. 633.

tions and their families, in manner therein mentioned; and he appointed J. W. Niblock (to whom he gave a legacy of 100*l.*) and his wife, his executor and executrix.

The wife was not mentioned by name in any part of the will. At the time of its execution, the testator was a married man; and, upon the death of his wife some time afterwards, he, in April, 1824, married a second wife, who survived him. He died in the month of August, 1824. Probate was granted to J. W. Niblock alone, as surviving executor.

One question in the cause was, whether the testator's widow was entitled to a life interest in the funded and other personal property under the bequest to his "beloved wife?"

[*630] *Mr. *Beames* and Mr. *Stinton*, for the plaintiffs, the residuary legatees.

Mr. *Bickersteth* and Mr. *Garratt*, for the executor.

Mr. *Tinney*, Mr. *K. Parker*, and Mr. *Keene*, for next of kin who were not legatees.

Mr. *Pemberton*, for the widow. On the one hand it was contended, that the description of "beloved wife" was applicable only to the wife *in esse* at the date of the will, and was as much personal to her as if her christian name had been inserted in the instrument; *Waring* v. *Ward*.(*a*)

On the other side it was argued, that the words were general, and would apply indifferently to any individual who should fill the character of the testator's wife at the time when his will was to take effect. In this view the term "wife" was descriptive of a class, like children or eldest son,—expressions which had been held to extend to all children, or to any son who answered the description at the testator's death.(*b*) An opposite construction would leave the widow entirely unprovided for, unless, which upon the will was extremely doubtful, and which he certainly never intended, the testator had left a part of his property undisposed of.

The Master of the Rolls was of opinion that the widow was not entitled to a life interest in the testator's personal estate; and he decreed accordingly [1]

(*a*) 5 Ves. 670. *Foster* v. *Cook*, 3 Bro. C. C. 347. Powell on Devises, by Jarman, I, 307, n. 339, 340, and n. So, a bequest to the parish where one lives, and testator afterwards changes his parish, is a good bequest to the first. Com. Dig. Chancery, 3 (Y) 16, pl. 1.

(*b*) *West* v. *Primate of Ireland*, 2 Cox, 258.

[1] A testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in the family, and then added, "to the other servants 500*l.* each." It was held that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of 500*l.* *Parker* v. *Marchant*, 1 Yo. & Coll. C. C. 290. Under a gift of the testator's real and personal estate to his wife for life, and the residue to be equally divided between her brothers and sisters, it was held that no brother or sister, who died before the date of the will, was capable of taking under the bequest. *Gray* v. *Garman*, 2 Hare, 268.

*Badham v. Mee. [*631]

Rolls.—1830; June 28.

A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.: Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father.

Patience Mee, by her will, devised the Tiled House estate to trustees, upon trust that they should receive the rents, issues, and profits thereof, as the same should from time to time become due, and in the first place, according to their will and pleasure, and not otherwise, allow and pay, yearly or oftener, to or for the use or benefit of her son Richard Mee the elder, any sum or sums of money, not exceeding in the whole in any one year the sum of 50*l.*, but so as her son during his life should have no other estate, right, or interest in the messuage, farm, and lands, than her trustees, or the survivors or survivor of them and his heirs, should, in their or his free and uncontrolled power and discretion, think fit and proper; and in the next place, should pay, apply, and dispose of the rents, issues, and profits of the messuage, farm and lands, unto and for the maintenance, education, and bringing up of Richard Mee, Sarah Mee, and John Mee, the children of her son Richard Mee, during the life of her son. The residue of her real and personal estate she gave to her two daughters.

Richard Mee the elder was still living; Richard Mee the son and Sarah Mee were dead; John Mee had long since attained the age of twenty-one; and one question in the cause was, whether John Mee had any interest in the rents of the Tiled House estate after he attained twenty-one.

Mr. *Treslove* and Mr. *Rolfe*, for the residuary devisees of Patience Mee.

*The devise being only for the maintenance, education, and bring- [*632] ing up of three of the children of Richard Mee the elder, must be intended to be confined to their minority.(*a*) To educate and bring them up was the object of the bequest, and maintenance is referred to merely as incidental to the other principal purposes. Whenever there ceased to be any one of them who was under age, the direction to the trustees to apply the rents towards their education and bringing up could no longer be carried into effect; and from that time the rents and profits were undisposed of, except by the residuary gift. *Hamley* v. *Gilbert.*(*b*)

Mr. *Bickersteth* and Mr. *Wright*, contra, cited *Alexander* v. *Maccullock.*(*c*)

The Master of the Rolls observed that, though the terms "maintenance, education, and bringing up," where no period was fixed except what

(*a*) See Ambl. 663. (*b*) Jacob, 354. (*c*) 1 Cox, 391.

was implied in the import of the words themselves, would have reference to minority, yet here the testatrix had limited a different period, namely, the life of the father; and he, therefore, held, that John Mee, as the survivor of the three children, was entitled to the surplus rents and profits during the life of his father.[1]

[*633] *HALLIWELL *v.* TANNER.

1830; July 5, 12.

Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt.

THE testator, having three leasehold estates, bequeathed them to three different persons; and one of them being subject to a mortgage made by him, he directed the mortgage money to be paid out of his residuary personal estate. The personal estate being insufficient for that purpose, a question was made, whether the legatees of the two other leasehold estates should contribute rateably with the leasehold estate in mortgage towards payment af the mortgage debt.

Mr. *Bickersteth* and Mr. *Barber*, for the legatees of the unincumbered

[1] The testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal; it was held that the nephew was entitled to the interest during his life: and Shadwell, V. C. said; "In the case cited," (*Badham v. Mee*,) "the words were, maintenance, education, and *bringing up*." Those words necessarily apply to the infant state. But all persons, who have attained twenty-one, are not in a state in which they do not want education; and there is no period of life in which a person does not require maintenance." *Soames* v. *Martin*, 10 Sim. 287. A testator made a certain provision for the infant son of his relation M. W. until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance out of the testator's funded property. It was held that the infant on attaining sixteen, was entitled to receive out of the testator's funded property, a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; Shadwell, V. C. said: "With respect to the time during which the maintenance of the child is to continue, it seems to me that the word 'future' comprehends all time; and it is probable that the child may be put into some business or profession, which will not afford him a maintenance until after he has attained the age of twenty-one. My opinion, therefore, is that the provision for the maintenance of the petitioner, ought to continue during his life; and I am confirmed in that opinion by seeing that in the prior part of the will, the provision for the maintenance of the three infants there named, is expressly circumscribed by the words, 'during their minorities.'" *Kilvington* v. *Gray*, id. 293. And see *Ellis* v. *Maxwell*, 3 Beav 587.

leaseholds, cited *Oneal* v. *Mead*,(*a*) *Rider* v. *Wager*,(*b*) *Lutkins* v. *Leigh*,(*c*) *Forrester* v. *Lord Leigh*,(*d*) and *Aldrich* v. *Cooper*.(*e*)

Mr. *Purvis* and Mr. *Jacob*, contra, relied on the intention of the testator to exonerate the mortgaged leasehold, as indicated by the direction in the will. In the cases referred to on the other side, contribution was refused, because no such intention appeared. *Carter* v. *Barnardiston*,(*g*) *Headley* v. *Readhead*,(*h*) and *Trimmer* v. *Bayne*.(*i*)

July 12.—THE MASTER OF THE ROLLS :—In the case of *Oneal* v. *Mead*,(*a*) it was decided that, as between a devisee of a mortgaged fee simple and a *specific legatee of personalty, the devisee should not have [*634] his mortgage paid by the specific legatee, but shall take the mortgaged fee simple *cum onere*. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold. The direction, that the mortgage debt should be paid out of the residuary personal estate, merely follows the general rule of law ;[1] and, that fund failing, the legatee of the mortgaged leasehold must take it *cum onere*.[2]

(*a*) 1 P. Wms. 693. (*b*) 2 P. Wms. 328. (*c*) Cas. temp. Talb. 53.
(*d*) Amb. 171. (*e*) 8 Ves. 382. (*g*) 1 P. Wms. 509.
(*h*) Coop. 50. (*i*) 7 Ves. 508.

[1] Vide *Phillips* v. *Parker*, Lloyd & G. 136, 142, note. *Marshall* v. *Holloway*, 5 Sim. 204. *Rogers* v. *Rogers*, 1 Paige, 188. *Halsey* v. *Reed*, 9 Paige, 454. *Duke of Cumberland* v. *Codrington*, 3 Johns. Ch. Rep. 257. As to the exceptions to the general rule, see *The Duke of Cumberland* v. *Codrington*, 2 Johns. Ch. Rep. 229. *McLearn* v. *McLellan*, 10 Peters, 625. *The Earl of Clarendon* v. *Barham*, 1 Yo. & Coll. C. C. 688. *King* v. *Whiteley*, 1 Hoff. Ch. Rep. 477. By the Revised Statutes of New York, vol. 1, (2d ed.) p. 740, § 4, it is enacted that, "whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy or discharge such mortgage, out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid."

[2] But where all the estates are charged by the testator with the payment of his debts, the specific devisee of a mortgaged estate is entitled to contribution from the specific devisee of another estate ; and a specific legatee of leasehold, is entitled to contribution for the payment of general specialty debts, from the specific devisee of freehold. Lloyd & G. 265, note, and cases there cited. And see *Livingston* v. *Livingston*, 3 Johns. Ch. Rep. 153. *Stevens* v. *Cooper*, 1 Johns. Ch. Rep. 425. *Clowes* v. *Dickenson*, 5 Johns. Ch. Rep. 235. *Campbell* v. *Messier*, 4 Johns. Ch. Rep. 334. S. C. 6 Johns. Ch. Rep. 21. *Schermerhorn* v. *Barhydt*, 9 Paige, 42.

Watts v. Turner.

Rolls—1830; July 6.

Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant.

A trust estate descended to the defendant; and the plaintiff who was *cestui que trust*, being entitled to the legal estate, a draft of the intended conveyance was sent to the solicitor of the defendant, and approved of by him. The defendant afterwards refused to execute the conveyance, unless the plaintiff paid him a sum of money. The bill was filed to compel a conveyance.

Mr. *Pemberton* and Mr. *Ching*, for the plaintiff.

Mr. *Wilbraham*, for the defendant the trustee, submitted, that, as the plaintiff had chosen to file a bill, instead of applying for a conveyance in a summary way by petition under the statute, he had himself to blame for any trouble and expense he had incurred.

The Master of the Rolls made the decree against the defendant with costs.[1]

[*635] *Rowlands v. Tucker.

Rolls.—1830: July 8.

A simple contract creditor, who files a bill for the administration of assets, will not be allowed his costs, if the estate is not sufficient for the payment of specialty debts.

This was a bill for the administration of assets, filed by a simple contract creditor. It turned out that the assets were not sufficient for the payment of the specialty debts.

Mr. *T. Parker*, for the plaintiff.

Mr. *Bickersteth*, contra.

The Master of the Rolls refused to allow the plaintiff his costs.(*a*)[2]

(*a*) See *Young* v. *Everest*, supra, p. 426.

[1] The trustees of the separate estate of a married woman were decreed to pay the costs of a suit instituted to compel them to transfer the fund into her name. *Therby* v. *Yeats*, 1 Yo. & Coll. C. C. 438. And see *Campbell* v. *Campbell*, 2 Myl. & Cr. 26. *Angell* v. *Davis*, 3 Myl. & Cr. 362. *Wilson* v. *Wilson*, 2 Keen, 252. *Townsend* v. *Westacott*, 4 Beav. 58.

[2] In a creditor's suit, the assets being sufficient to pay the debts, but insufficient to pay the debts and the costs of suit, taxed as between party and party, the court ordered the plaintiff's extra costs, as between solicitor and client, to be paid out of the fund. *Sutton* v. *Doggett*, 3 Beav. 9. A plaintiff, one of a number of creditors to a composition deed, having filed a bill to carry the trusts of that deed into execution, was obliged to make all the parties to the deed, and the several creditors specified in the schedule thereto, who had refused to join as co-plaintiffs, defendants: It

*Livesey v. Harding.[1] [*636]

Rolls.—1830; July 8, 16, 19.

Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross remainders.

Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively.

The testator, upon the failure of issue of his eldest or only son, limited his estate in the words following:—"To the use of all my and every the daughter and daughters of me the said Edmund Livesey, and the heirs of their bodies, to take as tenants in common; if more than one, equally; and if but one, to the use of such only daughter of me the said Edmund Livesey, and the heirs of her body for ever; and for default of such issue, to the use of my own right heirs for ever."

One question in the cause was, whether the daughters took cross remainders in tail?

Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth* contended, that cross remainders were to be implied between the daughters. If there were only two daughters (as was the case here,) and the devise had been to them by name, cross remainders would have been implied. The construction must be the same, the devise being to them as a class; and the implication would not be prevented by the circumstance that more than two individuals might be comprised in that class; for the rule, which excludes the implication of cross remainders between more than two, does not apply where the limitations are to a class, and not to certain persons by name or individual description. Besides, it was evident that the testator did not mean that any part of the estate should go over to his right heirs, so long as there was any issue of his daughters; and that intention could not be effected, unless cross remainders were implied.

Mr. *Treslove* and Mr. *Teed*, contra, argued that a devise to [*637] daughters and the heirs of their bodies, to take as tenants in common, was equivalent to a devise to them and the heirs of their respective bodies; a mode of limitation which, it was said, excluded the implication of cross remainders, even as between two devisees.

was held, notwithstanding that the suit in its result, was altogether for the benefit of the defendants, and that the fund had been rendered availiable by the plaintiff's exertions, yet that, according to the settled practice of this court, the plaintiff was only entitled to be paid his costs according to the priority of his demand. *Taylor* v. *Gorman*, 1 Dru. & Wal. 235, note. And see *Chissam* v. *Dewes*, 5 Russ. 29, 31, and note, ibid.

[1] S. C. Taml. 460, where some other points arising in the case are noticed, see ante 29, note.

The following cases were cited:—*Comber* v. *Hill*,(*a*) *Phipard* v. *Mansfield*,(*b*) *Atherton* v. *Pye*,(*c*) *Watson* v. *Foxon*,(*d*) *Doe d. Gorges* v. *Webb*,(*e*) and *Green* v. *Stephens*.(*g*)

The Master of the Rolls.—It being manifest that the testator intended that no part of the estate should go over, unless there were a failure of issue of all his daughters, it necessarily follows that the daughters took cross remainders.

Where there is a gift to two persons only and the heirs of their bodies, cross remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively, and then the remainders over will be several and respective.[1]

[*638] *Collins *v.* Shirley.

Rolls.—1830; July 9.

Assignees of an insolvent mortgagor are not entitled to the costs of a suit for foreclosure, though they by their answer disclaim, and say that if they had been applied to, they would have released the equity of redemption.

An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage.

This was a foreclosure suit by the mortgagee of a leasehold against Shirley, the mortgagor, who had taken the benefit of the insolvent act, and his assignees. The assignees by their answer disclaimed all interest, and said, that they would have released the equity of redemption, if any application for that purpose had been made to them.

Mr. *Lynch*, for the defendants, contended that the assignees, having disclaimed, and having been always willing to release the equity of redemption, ought not to have been brought to a hearing, and should, therefore, have their costs from the plaintiff. Shirley, he submitted, was improperly made a party; for a decree of foreclosure against his assignees would have bound him; and if they had released the equity of redemption, he could not have filed a bill to redeem.

Mr. *Pemberton*, contra:—The assignees having disclaimed, the insolvent might have redeemed; and it was, therefore, necessary to detain him as a defendant. The disclaimer of the assignees cannot entitle them to receive costs; for their disclaimer would not have given the plaintiff a good title.

(*a*) 2 Strange, 969. Cas. temp. Hardwicke, 22. (*b*) Cowper, 797. (*c*) 4 T. R. 710.
(*d*) 2 East, 36. (*e*) 1 Taunt. 234. (*g*) 17 Ves. 64.

[1] In the report of this case in Tamlyn, pp. 460, 464, the Master of the Rolls is made to say: "I think the cases upon this subject have been very absurd in drawing the distinction that cross remainders should be implied where there are only two, but not when there are more than two."

1830.—Collins v. Shirley.

THE MASTER OF THE ROLLS held, that the assignees were not entitled to their costs,[1] but that Shirley had been made a party improperly, and ought, therefore, to have his costs.[2]

[1] The assignee of an insolvent mortgagor, who by his answer to a bill of foreclosure, disclaimed, and, before the bill was filed, had consented to join in conveying the estate to the mortgagee and had distributed the insolvent's estate amongst the creditors, was ordered at the hearing to be paid his costs of suit, by the plaintiff. *Thompson* v. *Kendall*, 9 Sim. 397. In that case, Shadwell, V. C., said: "I have examined the case of *Collins* v. *Shirley* in Reg. Lib. A. fo. 2325, B., and I find that the statement, in the printed report, that the assignees said they would have released the equity of redemption if any application for that purpose had been made to them, does not appear from the registrar's book, to have been in their answer; but they said that all the real and personal estate of the insolvent had been, and then was vested in them; and then they disclaimed all interest in the mortgaged premises and the equity of redemption thereof; so that they admitted that they had the interest and then disclaimed it; and that admission not only made it necessary to bring them to the hearing, but also showed that they had a fund to answer all the costs to which they might be subjected by being brought to the hearing." A party having an interest in the subject matter of a suit by virtue of a partnership, had parted with his interest prior to the date of filing the bill; the plaintiff nevertheless made him a defendant, and he by his answer disclaimed. The plaintiff was ordered to pay such defendant's costs, without being entitled to them over, the court being of opinion that the plaintiff might have easily ascertained the fact of the assignment, and it not appearing that he had attempted to do so. *Teed* v. *Carruthers*, 2 Yo. & Coll. C. C. 31. "Lord Redesdale says, that if the defendant disclaims, the court will in general dismiss the bill against him with costs, and this is true in this sense; if his disclaimer shows that he never had any interest, or having had any, that he had parted with it, or disclaimed, or offered to disclaim before the bill was filed, he would be entitled to his costs because he was improperly made a party. But if he was interested at the time of filing the bill, and no special circumstance occurs in the case, the mere fact of his saying on the record in effect that he finds his interest worth nothing, and therefore repudiates it, does not prove that he was improperly made a defendant, and therefore does not bring him within the scope of the general rule to which Lord Redesdale adverts. I had occasion to consider this question in *Fewster* v. *Turner*, [December 18, 1841, not reported,] and *Cash* v. *Belcher*, (1 Hare, 310,) in both of which cases, after inquiry and examination, I was satisfied that a party disclaiming, in the sense which I have just suggested, would not be entitled to costs. The plaintiff cannot as a mortgagee be made to pay his mortgagor his costs, and if he was under no obligation to pay the costs, and could not dismiss the defendant before the hearing without paying them, he has no option but to bring him to the hearing." Wigram, V. C., *Tipping* v. *Power*, 1 Hare, 408, and see 9 Sim. 400, note, Am. ed.

[2] So, a bankrupt mortgagor is not a necessary party. *Kerrick* v. *Suffery*, 7 Sim. 317. If some of the defendants in a foreclosure suit disclaim, the court will decree them to be foreclosed, and not simply dismiss the bill as against them. *Perkin* v. *Stafford*, 10 Sim. 562. In a note to the last cited case it is said: "The decree in *Collins* v. *Shirley*, after reciting that two of the defendants had disclaimed any interest in the mortgaged premises, decreed that they should be foreclosed. It then directed an account of the principal and interest due on the mortgage, &c., and decreed that, on non-payment by the defendant who had not disclaimed, of the amount found due, and of the plaintiff's costs, within the usual time, that defendant should be foreclosed."

[*639] *HUMPHREYS *v.* HOWES.[1]

1830; July 9, 12.

A testator gave the residue of his estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death, to transfer the trust moneys to his two nephews B. and C., share and share alike; and if either of his nephews died before his share of the trust moneys became payable, without leaving issue, the share of him so dying was to go to the survivor: B., one of the nephews, died in the testator's lifetime, and left no issue: held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C.

JOHN HUMPHREYS bequeathed the residue of his personal estate to Johnson Howes, and Hoffgaard Shoobridge upon trust to invest the same in government securities; "and upon trust," continued the testator, "that they, Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay the dividends, interest, and produce of the said trust moneys, as the same shall become due and payable, unto my brothers Samuel Humphreys and Peter Humphreys, and my sister Hannah Coker, equally, share and share alike, during the term of their natural lives, and to the survivor of them during his or her natural life; and from and after the decease of them, my brothers and sisters, Samuel Humphreys, Peter Humphreys, and Hannah Coker, then upon trust that they the said Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, assign, transfer, and dispose of the said trust moneys, and the dividends, and interest, and produce thereof, unto my nephew John Crow, son of my said sister Hannah Coker, and my nephew John Humphreys, son of my brother Peter Humphreys, equally, share and share alike; and in case either of my nephews John Crow and John Humphreys shall happen to die before his share of the trust moneys last mentioned shall become payable by virtue of this my will, without leaving issue of his body lawfully begotten, then my mind and will is, that the share of him so dying, of and in the said trust moneys, shall go and be paid to the survivor of my two nephews John [*640] Crow and John Humphreys, when his original share therein *shall become payable; and in case both my nephews John Crow and John Humphreys shall happen to die before their share of the trust moneys shall become payable, without leaving issue of their bodies lawfully begotten, then upon trust that they the said Johnson Howes and Hoffgaard Shoobridge, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, assign, transfer, and dispose of the trust moneys last mentioned and the dividends, interest, and produce thereof, unto and amongst all and every the child and children of my brothers Samuel Humphreys, Peter Humphreys, William Humphreys, and Isaac Humphreys, and my sister Hannah Coker, as shall be then living, equally, share and share alike, when and as they shall attain their respective ages of twenty-one years."

[1] S. C. Taml. 497.

The testator's two brothers, Samuel Humphreys and Peter Humphreys, died in his lifetime: the nephew John Crow also died in his lifetime, and without leaving issue.

The next of kin of the testator insisted that, by the death of John Crow in the testator's lifetime, the moiety of the residue bequeathed to him lapsed: and the bill was filed by the nephew, John Humphreys, for the purpose of asserting his claim to the whole of the residue.

Mr. *Tinney* and Mr. *Lloyd*, for the plaintiff:—The will contains an express direction, that, in case either of the nephews dies without leaving issue, before the bequest becomes payable to him, his share of the trust moneys shall go to the survivor; and it is immaterial whether he dies in the lifetime of the testator or after his death, but before the interests of the tenants for life have expired. *Willing* v. *Baine*,(*a*) *Humberstone* v. *Stanton*,(*b*) and *Walker* v. *Main*.(*c*)

*Mr. *Pemberton* and Mr. *Bethell*, contra:—*Cripps* v. *Wolcott*,(*d*) [*641] proves that survivorship is referred to the death of the testator, if no interest be given prior to that of the legatees among whom the survivorship is to take place; but if a previous life estate be given, it is referred to the death of the tenant for life. According to the principle of that doctrine, where the event of the death of a legatee is provided for, that death ought to be considered to mean dying in the testator's lifetime, if the interest of the legatee is not preceded by a life interest given to another—and dying in the lifetime of the tenant for life, if a previous life estate be given. Accordingly, in *Bone* v. *Cooke*,(*e*) a direction, which was to take effect in case of the death of a legatee in remainder before the legacy became payable to him, was held to apply only to the event of his surviving the testator, and dying in the lifetime of the tenant for life. In this class of cases the question is, whether the testator contemplated the death of the legatee in his lifetime, or the event of his surviving him and dying afterwards. If a previous life estate be not given, there is no other period to which the death of the legatee can be referred except the life of the testator; but where there is a previous life estate, it is death during the continuance of that tenancy for life which is contemplated. What this testator has given over to the survivor of his nephews is "the share of him so dying of and in the trust moneys." It must have become *his* share, that is, the interest must have vested in him, before it can go over in the event of his death: if he die in the testator's lifetime, he never has an interest in the moneys; there is no share of them which can be called *his*; and, consequently, there is no share of them *which [*642] can pass by the limitation over. *Rider* v. *Wager*,(*g*) *Corbyn* v. *French*.(*h*)

(*a*) 3 P. Wms. 113. (*b*) 1 V. & B. 385. (*c*) 1 Jac. & W. 1. (*d*) 4 Mad. 11.
(*e*) 13 Price, 332. M'Clel. 168. (*g*) 2 P. Wms. 331. (*h*) 4 Ves. 418.

The confusion and error, which seem to pervade some of the authorities on this subject, have been occasioned by an inaccuracy in Vernon's report of *Miller* v. *Warren*.(a) In that case a testator gave to Nicholas Miller 1500*l.*, to be paid him at twenty-one; to Benjamin Miller, 1500*l.* when he attained the like age; and to Elizabeth Miller and Mary Miller 1500*l.* a piece, to be paid at eighteen or marriage; and in case one or more of the aforesaid children should happen to die before his, her or their legacy or legacies should become due, then, his, her, or their legacy or legacies were to be equally divided amongst the survivors of them. Mary, one of the four children of Miller, died in the lifetime of the testator; and according to Vernon's report, the question was, whether her 1500*l.* should go to the surviving children. He says it was decreed that it should survive; and he adds, "if a legacy is devised to A. at twenty-one, and if he die before, to B., though A. die in the lifetime of the testator, the legacy shall go to B." In *Willing* v. *Baine*,(b) *Miller* v. *Warren*, is cited and relied on; and *Willing* v. *Baine*, in its turn, became, in *Humberstone* v. *Stanton*,(c) the occasion of drawing from Sir William Grant, an observation which was not at all necessary for the decision of the question before him. Thus the supposed doctrine on the point has all proceeded upon what was believed to have been decided in *Miller* v. *Warren*. But it now appears by the extract from the decree contained in Mr. Raithby's note on that case, that the decision was directly the contrary to what Vernon states it to have been; for the
[*643] bill was dismissed *in so far as it claimed by survivorship a share of Mary Miller's legacy.

Mr. *Pattison*, for the trustees.

Mr. *Tinney*, in reply.

July 12.—THE MASTER OF THE ROLLS:—The leading case on this subject is *Willing* v. *Baine*.(b) There a testator bequeathed 2000*l.* a piece to his children, payable at their respective ages of twenty-one years; and if any of them died before their age of twenty-one, the legacy so given was to go to the surviving children. One of the children died in the lifetime of the testator, and before twenty-one: and it was held that the legacy given to him went to the surviving children. The authority is referred to by Sir William Grant in *Humberstone* v. *Stanton*;(c) and he says, "It is now settled, that in such a case the bequest over takes place."

In the argument of the present case it was stated, that, in *Willing* v. *Baine* there was no previous interest for life, and that the previous interest for life, which is limited here, makes the difference; and two or or three authorities were referred to in support of that distinction: but it will be found upon examination that in none of these did the decision

(a) 2 Vern. 207. (b) 3 P. Wms. 113. (c) 1 Ves. & B. 385.

proceed upon a principle which has any application to the present question. Thus, in *Bone* v. *Cooke*(*a*) a testator gave a legacy to one for life, with remainder to another person; and he declared that, if the remainderman should die before the bequest became payable, it should [*644] go to his executors or administrators, as part of his personal estate: the remainderman having died in the lifetime of the testator, the question was, whether his executors could claim the bequest; and the court held that the legacy was lapsed, and that the death, upon which it was to go to the executors or administrators of the legatee in remainder, was a death during the life of the tenant for life.

The very point raised here was decided in *Walker* v. *Main*.(*b*) There a previous interest was given to the widow for life; remainder to the testator's children; and if any of them died before his legacy became payable, it was to go to the survivors: two of the children died in the testator's lifetime: and it was there held, as a settled point, that the death of a child during the life of the testator did not cause the legacy of the child to lapse.[1]

(*a*) 13 Price, 332. M'Clel. 168. (*b*) 1 Jac. & W. 1.

[1] "One of the earliest cases on this subject is that of *Ledsome* v. *Hickman*, (2 Vern, 611,) where the testator devised 300*l.* to each of his three daughters at twenty-one or marriage; and if any of them died before that time her share to go to the survivor. One of the daughters having died in the lifetime of the testator the question arose whether the legacy was lapsed or should go to the two surviving sisters. Lord Chancellor Cowper decided that the limitation over was good as an executory devise. Although the reporter adds a *sed quære tamen* to the report of that case, it was followed by the same Chancellor, eight years afterwards, in the case of *Bird* v. *Lockey*, (2 Vern. 744,) and by Lord King in the subsequent case of *Willing* v. *Baine*, (2 P. Wms. 113.) It was probably urged in those cases, as in this, that there could be no legacy unless the legatee survived the testator; and that the legacy intended by the testator being lapsed, there was nothing to go over to the substituted legatees. The short answer to that, however, is, that the bequest to the substituted legatees in such a case is an original legacy to them at the death of the testator; the event having then happened upon which their substitution in the place of the first named legatee depended. And this is so whether such legacy to the substituted legatee is then vested, or is contingent and dependant upon some future event. The principle that the legacy to the substituted legatees does not lapse by the death in the lifetime of the testator of the legatee in whose place they were substituted by the will, is also fully recognized in several recent decisions in the court of chancery in England."—"Where a legacy or devise, or residuary bequest is given to two or more persons by name, as tenants in common, or in severalty, or to be divided among them share and share alike, and without any words indicating an intention of the testator to give the same over to the survivors, the shares of such persons respectively will become lapsed by the death of the devisee or legatee in the lifetime of the testator." Walworth, chancellor. *Mowatt* v. *Carow*, 7 Paige, 337, 340. And see *Gittings* v. *McDermott*, 2 Myl. & K. 69. *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35. *McKimon* v. *Peach*, 1 Keen, 555. *Le Jeune* v. *Le Jeune*, id. 701. *Sillick* v. *Booth*, 1 Yo. & Coll C. C. 121. *Wright* v. *Trustees of Methodist Church*, 1 Hoff. Ch. Rep. 202.

[*645] *DAVIS *v.* DAVIS.

ROLLS.—1830; July 16. L. C.—1831; November 16, 26.

A direction in a will, that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favor of the daughter.

THE testator in this cause made his will in the following words:—"It is my will that my brother Samuel Davis, be my executor, to arrange, dispose of and settle all my affairs, and I appoint him guardian to my daughter Anna Maria."

The daughter Anna Maria, was the testator's only child; and during his life, no doubt as to her legitimacy had been entertained by him or any other person: but after his death, it was discovered that she was illegitimate, in consequence of the formalities required by the law, as it then stood, not having been duly observed on the marriage of the testator and her mother. Samuel Davis, the brother, was one of the testator's next of kin.

The question in the cause came ultimately to be whether by the will a gift of the testator's personal estate to his daughter was to be implied.

Mr. *Tinney*, in support of the implication, cited *Atkinson* v. *Paice*,(*a*) *Peat* v. *Powell*,(*b*) *Doe dem Wight* v. *Cundall*,(*c*) and *Tompkins* v. *Tompkins*, referred to in that case.

Mr. *Bickersteth* and Mr. *Lynch*, contra:—There may probably be enough in this will to show that the testator did not mean his brother to take his property beneficially, and that the executor was to be a trustee,

[*646] *for the next of kin. But that will not assist the plaintiff's case; and there is no circumstance from which an inference specifically in her favor can be deduced, unless it be that the testator has appointed his brother her guardian. This appointment is ineffectual; and how an unavailing attempt to appoint a guardian to a natural child can operate as a gift to that child of the whole of the testator's personalty cannot easily be conceived.

THE MASTER OF THE ROLLS:—It is plain that it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs: and from his appointment as guardian to the daughter, it is to be implied that the arrangement and settlement was to be for her benefit. The daughter is, therefore, to be considered as the legatee of the personal estate. A different construction would certainly disappoint the testator's intention.

1831; *November* 16.—The executor appealed from his honor's decree.

Sir *E. Sugden* and Mr. *Lynch*, for the appellant contended that his honor's

(*a*) 1ro. C. C. 91. (*b*) 1 Eden, 479. Amb. 387. (*c*) 9 East, 400.

decision carried the doctrine of bequest by implication to a dangerous extent and infinitely farther than the cases warranted. The first clause, nominating the testator's brother to be his executor, to manage, dispose of, and settle his affairs, did not affect to deal with the property at all, but merely designated the individual by whom the property was to be administered for the benefit of the persons to whom the law might give it. Could, then, the subsequent clause, either standing alone, or coupled with *the [*647] former amount to a bequest? That clause appointed the brother to be the guardian of the daughter, Anna Maria, (an appointment which, as she was illegitimate, her father had no power to make,) but it said not a word of any property to which she was to be entitled. In the full belief that Anna Maria was his lawful child, and, as such, his next of kin, the testator considered it superfluous to bequeath to her in terms that which he felt assured the law itself would bestow. The circumstance of her supposed legitimacy, which at once explained the reason why, with all his anxiety for his daughter's welfare, he should have made no express provision for her by his will, furnished the most cogent argument against the implication attempted to be set up in her favor.

Mr. *Tinney* and Mr. *Barber*, on the other hand, submitted that, upon the plain meaning of the words, the brother could be nothing but a trustee: he was nominated an executor solely for the purpose of managing, disposing of, and settling the testator's affairs; and the single question was, for whom was he to be that trustee? The very next sentence in the will, taken in connection with the context, supplied the answer. He was to be a trustee for the only other individual named in the instrument, for the daughter, Ann Maria, of whom it appointed him the guardian. He stood *in loco parentis* to his infant niece; and to him, therefore, as her guardian, was intrusted the care and protection of her person, as well as the management of her fortune, till she came of age, when, of course, he was to make it over to her. Morally speaking, it was impossible to doubt the testator's intention that his daughter should then come to the enjoyment of his property; and, rather than disappoint that intention, and allow him to die intestate, the court would eagerly lay hold of an *implication which the relative situation of the parties, [*648] and the peculiar provisions of the will naturally, if not necessarily, raised.

In addition to the cases referred to in the court below, *Newland* v. *Shephard*,(a) *Hammond* v. *Neame*,(b) *Bird* v. *Hunsdon*,(c) *Crowder* v. *Clowes*,(d) *Goodright* v. *Hoskins*(e) were cited.

November 26.—The Lord Chancellor,(g) in delivering judgment, observed, that the will contained no words of positive gift; and there was nothing, so far as he could perceive, in its language or provisions, from which

(a) 2 P. Wms. 194. (b) 1 Swanst. 35. (c) 2 Swanst. 342.
(d) 2 Ves. jun. 449. (e) 9 East. 306. (g) Lord Brougham.

a bequest to the daughter could be safely or reasonably implied. The authorities relied upon in support of such an implication, and particularly *Newland* v. *Shephard* and *Goodright* v. *Hoskins*, even granting them all the weight that was claimed for them at the bar, (although the former had been at different times a good deal questioned, and the latter had been mainly rested by Lord Ellenborough upon special grounds,) fell very far short, in his opinion, of the case now standing for decision. For these reasons he felt himself under the necessity of coming to a different conclusion from his honor, and the decree must therefore be reversed.[1]

[*649] *TORRES *v.* FRANCO.

1830; July 17.

By a marriage settlement stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture, and to the wife during her life in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons; the wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one, and married; held, that the stock vested in that son absolutely.

BY articles of agreement, executed in contemplation of an intended marriage between Jacob Namias Torres and Rebecca Britanias, a sum of 1500*l.* bank stock was vested in trustees upon trust, "as to the dividends and interest of the sum of 1500*l.* bank stock, which shall accrue due during the joint lives of Jacob Namias Torres and Rebecca Britanias, to pay the same to him, Jacob Namias Torres, or to authorize and permit the same dividends and interest to be received by him for his own use; and from and immediately after the time of the death of Jacob Namias Torres, in case Rebecca shall survive him, then upon trust from and immediately after such his death,

[1] "I take the rule to be universal, that nobody can entitle himself to an interest under a written instrument, unless he can make out that he is entitled to the interest he claims by the words of that instrument; and where the court, by what is called implication, as distinguished from express gift, gives property to a claimant, it does not by so doing contravene the rule that an unequivocal intention to give must be found in the instrument itself."—Wigram, V. C.; *Blacklow* v. *Laws*, 2 Hare, 50, and see *Vaughan* v. *Foakes*, 1 Keen, 58, 61, n. 1. *Radburn* v. *Jervis*, 3 Beav. 450. *Marsh* v. *Hague*, 1 Edw. Ch. Rep. 174.

as to the dividends and interest of the sum of 1500*l.* bank stock, from thence and during the life of Rebecca Britanias to accrue due, to pay the same dividends and interest to her the said Rebecca, or to authorize and permit the same to be received by her for her own use; and from and immediately after the time of the death of the said Rebecca Britanias, in case there shall be any child or children of the said intended marriage living at the time of her *decease, then upon trust to stand possessed of the said [*650] sum of 1500*l.* bank stock for the use and benefit of such of the said children as shall attain the age of twenty-one years, or be married, equally to be divided between or amongst them, share and share alike, if more than one, and if there shall be but one such child who shall live to attain that age, or be married, then for the sole use and benefit of such child; and in case all or any of such children shall, at the time of the death of the said Rebecca, be under the said age of twenty-one years, and unmarried, then, as to the dividends and interest of the said sum of 1500*l.* bank stock, or of the apparent share or shares thereof of the said child or children, who shall for the time being be under the said age, and unmarried, to accrue due until he, she, or they shall attain that age, or be married, upon trust to pay the same unto the said Jacob Namias Torres, in case he shall be then living, he maintaining and educating such child or children; but in case the said Jacob Namias Torres shall die before all such children shall attain the said age, or be married, then upon trust to pay, apply, and dispose of the last mentioned dividends and interest in, for, or towards the respective maintenance and education of such child or children so under age and unmarried; and in case the said Rebecca Britanias shall die without leaving any child or children at the time of her decease, or in case there shall be one or more such children or child then living, yet all of them shall die under the age of twenty-one years, and unmarried, then and in such case, and if the said Jacob Namias Torres shall survive the said Rebecca Britanias and all such children, if any there be, then as to the dividends of the said sum of 1500*l.* bank stock to accre due from and after the time of the death of the longest liver of the said Rebecca Britanias and all the said children, and during the lifetime of the said Jacob Namias Torres, upon trust *to [*651] pay the same dividends and interest to him, or to authorize and permit the same to be received by him for his own use; and from and immediately after the time of the death of the survivor of them, the said Jacob Namias Torres and Rebecca Britanias, and also from and after the death of all the said children, (in case there shall be any, and all of them shall die under age and unmarried as aforesaid,) then the said sum of 1500*l.* bank stock shall be paid to David Franco, Abraham Haim Franco, Jacob Franco, the younger, and Daniel Franco, and their respective executors, administrators, and assigns, in the shares and proportions therein mentioned."

The marriage was solemnized. Rebecca Britanias survived her husband; and at her death no child of the marriage was living; but a son, who died in

her lifetime, had attained twenty-one, married, and left children. No other child of the marriage had attained twenty-one or married.

The question in the cause was, whether this son took a vested interest in the 1500*l.* stock?

Mr. *Pemberton* and Mr. *Theobald*, for the personal representatives of the deceased son :—In construing wills, and still more in construing marriage settlements, the court inclines against making the right of children to a provision dependent on the contingency of their surviving both or either of their parents. In *Powis* v. *Burdett*(*a*) portions were provided for younger children whom the parent should leave at his death, to be paid at twenty-one ; and a child, [*652] who *attained twenty-one, and died in the lifetime of the parent, was held to be entitled. In *Woodcock* v. *The Duke of Dorset*(*b*) the words were, " That, if Lord John and Lady Frances should leave at the death of the survivor any child or children of their two bodies, then the sum of 5000*l.* was to be raised and paid to such child or children upon their attaining the age of twenty-one years :" and it was held, that a child, who having attained twenty-one, died in the lifetime of Lady Frances, took a vested interest. The same principle of construction was followed in *Perfect* v. *Lord Curzon*,(*c*) *Maitland* v. *Chalie*,(*d*) and *Howgrave* v. *Cartier*.(*e*) In the last case Sir Willian Grant lays down the rule, "If the settlement is incorrectly or ambiguously expressed ; if it contain conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision ; usually as to sons, at the age of twenty-one, and as to daughters, at that age or marriage." Now, though there are phrases in some parts of this settlement which import that only such children as shall be living at the death of the mother are to take, there are other clauses in which reference is made to the event of all the children dying under twenty-one and unmarried, as being the only state of circumstances on which their interests are to fail. There is obviously great inaccuracy in the phraseology of the instrument; for, in providing for the event of the mother's surviving the father, the dividends are directed to be paid, after the mother's death, to the father, for the maintenance of the children.

[*653] *Mr. *Tinney* and Mr. *J. Russell*, contra :—By the first part of this settlement the dividends of the stock are given to the husband during the joint lives of him and the wife ; remainder to the wife during her life, in case she should survive him : and the subsequent limitations are not confined to the event of the wife surviving the husband, but dispose of the fund after her decease, whether she survive her husband or the husband survive her. It is a mistake, therefore, to say that there is any inaccuracy in the phraseology

(*a*) 9 Ves. 428. (*b*) 3 Bro. C. C. 569. (*c*) 5 Mad. 442.
(*d*) 6 Mad. 245. (*e*) 3 Ves. & B. 79.

of the deed, because in some of these subsequent limitations reference is made to the possibility of the husband being alive, when they take effect. The disposition of the property, after the wife's decease, is expressed in unequivocal words. The trust is, in case there shall be any children of the marriage living at her decease, for such of the said children as shall attain the age of twenty-one years or be married; and a provision is made for the event of all or any of such children, (that is, children living at the decease of the mother,) being then under the age of twenty-one and unmarried. These are the only words of direct gift to the children; and the gift is confined in the most express terms to children living at the death of the mother. The settlement next proceeds to direct, that, in case Rebecca Britanias shall die without leaving any child or children, or in case there shall be one or more such child or children then living, and yet all of them (that is, all of the children living at her death) shall die under twenty-one and unmarried, the husband is to receive the dividends during his life, "and from and immediately after the death of the survivor of them, Jacob Namias Torres and Rebecca Britanias, and after the death of all the said children," (that is, children living at the death of the mother,—for these are the only children mentioned in the settlement,) "in case there *shall be any, and all of [*654] them shall die under age and unmarried as aforesaid," the fund is limited over to certain persons named. Throughout all the clauses, "such children," and "the said children," are children of the marriage living at the decease of the mother: and the fund is given over, in the event either of there being no children living at the mother's decease, or if there be such children then living, of their dying under twenty-one and unmarried. This settlement clearly and unequivocally makes the right of a child to a provision dependant on the contingency of its surviving the mother; there is no ambiguity or inaccuracy of expression which can authorize the court to deviate from the express words of the instrument; and, therefore, nothing vested in the son who attained twenty-one, married, and died in the mother's lifetime. *Hotchkin* v. *Humfrey*,(*a*) *Fitzgerald* v. *Field*.(*b*)

The Master of the Rolls:—This case is to be decided upon the principle established in *Howgrave* v. *Cartier*.(*c*) The gift over is not to take effect, unless all the children die under age and unmarried. This is inconsistent with the clause which imports, that a child, to take, must survive the mother, and where clauses are conflicting, the rational presumption is, that a child, attaining twenty-one, takes a vested interest.(*d*)[1]

(*a*) 2 Mad 65. (*b*) 1 Russ. 430. (*c*) 3 Ves. & B. 79.

(*d*) *Clutterbuck* v. *Edwards*, post. [Vol. 2, p. 577.]

[1] Vide *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 203, 204. *Whatford* v. *Moore*, 3 Myl. & Cr. 270, 285, 289. *Tilghman and wife* v. *Tilghman's executors*, 1 Baldw. 464. *Davies* v. *Davies*, 4 Beav. 57.

[*655] *SHERRATT v. BENTLEY.

1830: July 22.

A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trusts, is entitled to his costs as between solicitor and client.

A PERSON who was named a trustee, in a deed, but had not executed it or accepted the trusts, was made a defendant to a suit relative to the administration of the trusts.

At the hearing Mr. *Daniell*, on his behalf, asked for his costs as between solicitor and client.

Mr. *Tinney* and Mr. *Pemberton*, for the other parties, argued, that, as he had never accepted the trusts, he was not and never had been a trustee, and that he could not now claim to be considered as such, merely for the purpose of obtaining more liberal costs.

THE MASTER OF THE ROLLS ruled, that where a person is named a trustee without his knowledge, and never in any manner acts in or accepts the trust, and such person is afterwards made a party to a suit respecting the trust, he is entitled to his costs as between solicitor and client.[1]

[*656] *PARKER v. FULLER.

1830; July 23.

Persons having prior incumbrances on freeholds and copyholds, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates.

A FATHER devised to his son freehold and copyhold estates charged with annuities and legacies; the son died intestate, and was, at the time of his death a trader within the meaning of the bankrupt laws. The bill was filed by a creditor of the son, for the purpose of having the freeholds and copyholds, devised to him by his father, applied in payment of his debts. The annuitants and legatees under the will of the father were defendants; and the question was, whether they were properly made parties to the suit.

Mr. *K. Parker*, for the plaintiff contended, that a decree could not be made for the sale of the estates, unless the annuitants and legatees were before the court; that as copyholds were not within the 47 G. 3, sess. 2, c. 74, they could not be made directly available to the payment of the son's debts; but to whatever extent the legatees and annuitants might have exhausted the freeholds, the creditors would be entitled to come in upon the copyholds; and that this process of marshalling could not be carried into effect unless the persons, between whom it was to take place, were before the court.

Mr. *T. Parker*, contra.

[1] Vide *Greenwood* v. *Wakeford*, 1 Beav. 576. *Bowman* v. *Rainetaux*, 1 Hoff. Ch. Rep. 150.

THE MASTER OF THE ROLLS held, that the legatees and annuitants, being merely persons having incumbrances on the estates prior to the interest of the son, ought not to have been made parties.

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*ANSLEY *v.* BAINBRIDGE. [*657]

1830; July 24.

The assumption by a father of a debt due from his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death.

BY settlement made on the marriage of John Bainbridge, a sum of 4000*l.* secured by his bond, was so limited, as, upon his death, to become payable to a son, who was the only issue of the marriage. The father admitted the son into partnership with himself and two other persons. The son over drew his account with the partnership to the amount of upwards of 19,000*l.*; and an arrangement was entered into, between all the partners, by which the son ceased to have any interest in the concern, and the father took upon himself the son's debt.

After the father's death, the trustees of the bond filed the present bill to have the 4000*l.* satisfied out of his assets; and the question was, whether the assumption of the son's debt by the father was to be deemed an advancement so as to amount to satisfaction of the bond.

Mr. *Pemberton* and Mr. *Ching*, for the plaintiffs, cited *Goldsmid* v. *Goldsmid*,(*a*) *Devese* v. *Pontet*,(*b*) *Onslow* v. *Michell*.(*c*) There were no circumstances, they said, to show that what the father had done was meant to be a substitution for that which his covenant bound him to do. The assumption of the son's debt was a part of a specific arrangement, in which the existence of the bond was in no way adverted to: it was a measure to which the father was led by anxiety for the prosperity of the concern in which he himself had a great share, and by a wish to *allay the fears of the [*658] partners, who were alarmed at the state of the son's account.

Mr. *Bickersteth* and Mr. *R. Roupell*, for the executrix of the father, contended, that the father's assumption of the debt of the son was tantamount to payment of it to the partnership; that the circumstance of the father being one of the partners made no difference; and that the case was precisely the same as if the father had advanced the 19,000*l.* for the payment of the son's debt to another person.

THE MASTER OF THE ROLLS dismissed the bill, upon the ground that the

(*a*) 1 Swanst. 219. (*b*) 1 Cox, 189. (*c*) 18 Ves. 490.

assumption of the debt of 19,000*l.* by the father for the son was to be deemed an advancement of the 4000*l.*[1]

[*659] *BAYLEY *v.* BEST.

1830; July 27

To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties.

THE plaintiff was tenant for life, of an undivided moiety of certain premises. The bill alleged that the person, in whom the other moiety was vested, had taken a lease of the plaintiff's moiety, and being thus in possession of the whole had confounded the boundaries of this property and of an adjoining tenement, of which he was the owner. The prayer was for a partition, and for a commission to ascertain the boundaries.

The remaindermen, to whom the inheritance of the plaintiff's moiety was limited, were not parties to the suit; and on this ground the defendants objected to the frame of the bill.

Mr. *Tinney* and Mr. *Walker*, in support of the objection.

It may be doubted, notwithstanding the decision in *Baring* v. *Nash*,(*a*) whether the court ought to proceed to so important an act as partition, where all the persons interested in the property are not parties to the suit. But this bill prays that the boundaries of the premises may be ascertained; and such a bill cannot be maintained, unless all persons interested in the inheritance are before the court. In *Miller* v. *Warmington*,(*b*) the attorney general was made a defendant, merely because there was a suggestion that the crown had an interest in the reversion expectant on a term, of which upwards of 300 years were unexpired. *Speer* v. *Crawter*.(*c*)

[*660] Mr. *Bickersteth*, Mr. *Pemberton*, and Mr. *Wilbraham*, contra, cited *Baring* v. *Nash*,(*d*) and *Wills* v. *Slade*;(*e*) and they argued, from analogy to the rule of cases of partition, that the remainderman or reversioner was not a necessary party to a bill for a commission to ascertain boundaries.

THE MASTER OF THE ROLLS held, that the court would not entertain a bill for a commission to ascertain boundaries, without having before it all the parties interested; and he, therefore, allowed the objection.[2]

(*a*) 1 Ves. & B. 551. (*b*) 1 Jac. & W. 484. (*c*) 2 Mer. 410.
(*d*) 1 Ves. & B. 551. (*e*) 6 Ves. 498.

[1] Vide *Gilbert* v. *Witherell*, 2 Sim. & Stu. 254. *Hill* v. *Gomme*, 1 Beav. 554. *Seawin* v. *Seawin*, 1 Yo. & Coll. C. C. 65. *Skeats* v. *Skeats*, 2 Yo. & Coll. C. C. 9.

[2] Vide *Godfrey* v. *Littel*, ante, 59.

HOLMES *v.* HOLMES.

ROLLS.—1830; July 27.

A testator by his will, made in Ireland, prior to the 6 G. 4, c. 79, bequeaths an annuity, and dies domiciled in England, after that act was passed. The annuity is to be paid according to the rate of Irish currency.

A TESTATOR, who was at the time domiciled in Ireland, made his will, dated the 12th of October, 1821, and thereby after giving his widow an annuity charged on certain Irish estates, proceeded in the following words: —"And I also give and bequeath unto my son Frederick Holmes, one annuity, clear yearly rent charge, or sum of 200*l.*, to be chargeable upon, and issuing and payable out of all my aforesaid lands, tenements, hereditaments, and premises whereof I shall die seised or possessed, of any estate real, freehold, or term for years, and to be paid and payable to him, in addition to the provision which I have already made for him by a certain deed by me executed, and bearing date the 17th of February, 1821; the annuity to be paid by two even and equal half yearly payments, on every first day of May and first day of November, in each and *every year, for [*661] and during the term of his natural life, without any deduction or abatement whatsoever."

The testator afterwards transferred his residence to England, and died domiciled there on the 2d of March, 1826.

The first section of the 6 G. 4, c. 79, which came into operation on the 27th of June, 1825, enacts that, "on and from and after the commencement of this act, the currency of Great Britain shall be and become, and is hereby declared to be the currency of the whole united kingdom of Great Britain and Ireland; and that on and from and after the commencement of this act, all receipts and payments, and all gifts, grants, contracts, bargains, sales, agreements, and stipulations, and all written bonds, bills, notes, drafts, acceptances, receipts, acknowledgments, undertakings, or securities for money, and all transactions, dealings, *matters and things whatever relating to money, or involving or implying the payment of money, or the liability to pay any money*, which shall be had, made, done, executed, or entered into, in any and every part of the said united kingdom, shall be had, made, done, executed, and entered into according to such currency of Great Britain, so becoming the currency of the united kingdom, and not according to any currency, or as money hath been or may be valued in any particular part of the said united kingdom, or in any other manner than according to such currency of the said united kingdom, except as hereinafter is specially provided; and that all such receipts, &c. shall be taken to be had, made, executed, done, and entered into according to such currency of Great Britain, &c. and in reference to money of the value and description circulating in Great Britain at the passing of this act, unless the contrary be proved to have been the intention of the parties concerned."

[*662] *One question in the cause was, whether the annuity was to be computed in Irish currency or in English sterling money?

Mr. *Pemberton* and Mr. *J. Russell*, for the plaintiff.

Mr. *Bickersteth*, and Mr. *Hinde* for the defendants.

On the one side, it was contended that the annuity did not exist till the the death of the testator, which was subsequent to the act for the assimilation of the currency throughout the united kingdom; that the right to the annuity did not arise till then; and that it was, therefore, a matter or thing had, made, or done after the 27th of June, 1825, and consequently was to be computed according to the currency of Great Britain, which from that date was to be the common currency of the two countries.

On the other hand, it was argued that a gift by will is a matter or thing made at the time when the will is made, and that it has existence thenceforth, though it is not perfected till the death of the testator; that as the will of this testator was long anterior to the act for the assimilation of the currency, the bequest of this annuity was not a matter or thing made or done after that act passed; and, therefore, that the annuity ought to be computed in the same manner, and paid in the same currency, as if the 6 G. 4, c. 79, had never passed; that is, in the currency of the country in which the will was made, and the lands charged with the payment were situate.

Lansdowne v. *Lansdowne*,(*a*) and the cases there cited, were referred to.

[*663] *The Master of the Rolls was of opinion that the bequest of the annuity though not perfected till the death of the testator, was a gift made at the time of making the will, and, the gift being prior to the 6 G. 4, c. 79, that the annuity was to be computed in Irish currency.(*b*)

(*a*) 2 Bligh, 10.

(*b*) So as to a will made before the statute of charitable uses, *Ashburnham* v. *Bradshaw*, 2 Atk. 36, 7 Mod. 239. *Willett* v. *Sandford*, 1 Ves. 176. *Attorney General* v. *Downing*, Amb. 550; (but see *Attorney General* v. *Heartwell*, 2 Ed. 234.) So also as to a will made before the statute of frauds, *Carvill's case*, 2 Ch. Rep. 302. *Serjeant* v. *Puntis*; or an agreement in consideration of marriage, *Gilmore* v. *Shuter*, 2 Lev. 227. *Secus* as to the Irish statutes declaring the lands of papists descendible as in gavel kind, notwithstanding a devise, (where however the words are peculiar.) *Burke* v. *Morgan*, 5 B. & C. 365, Toml. ed. As to the effect upon bequests of stock, of subsequent conversions under the stock acts, see *Bronsdon* v. *Winter*, Amb. 57, and the cases there cited, and *Banks* v. *Sladen*, supra, 216.[1]

[1] Vide *Vawdry* v. *Geddes*, Taml. 367. Rev. Stat. N. Y. vol. 2, p. 12, § 77.

Sutton *v.* Sutton.

1830; July 29.

Under the treaty of 1794 between Great Britain and America, and the act of the 37 G. 3, c. 97, American citizens, who held lands in Great Britain on the 28th of October 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain.

This was a bill for the specific performance of a contract: and the master having reported against the title, an exception was taken to his report, which now came on to be argued.

The title of the vendor was derived under a conveyance from a citizen of America; and the question was, whether, under the circumstances of this case, and in relation to the property, which was the subject of the contract, an American citizen was to be deemed an alien?

Samuel Strudwick, before and at the time of the separation of the United States of North America from Great Britain was settled in North Carolina, and he continued *to reside there, as an American citizen, [*664] till his death in 1794. By his will, dated in that year, he devised to "his good friend Margery, widow of Stephen———, lately living at Fulham in England, his houses and lands in the city of London, in trust to be sold, when Mr. Vaughan's annuity shall drop in, and the moneys arising from such sale to be employed as therein mentioned:" and, after bequeathing two small annuities, he gave the residue of his real and personal estate to his son William Francis Strudwick. A part of this testator's property consisted of an undivided share of certain tenements in the city of London, which were the subject of the present suit. A person of the name of Margery Bourget was considered to be the devisee referred to in the will: she declined to carry the trust into effect, or to interfere in the management of the property, and was said to have died about the year 1806. William Francis Strudwick, the heir at law and devisee of Samuel, was an American citizen, and died intestate in the year 1810, leaving Samuel Strudwick, also an American citizen, his eldest son and heir at law. In 1819, the last mentioned Samuel Strudwicke sold and conveyed his undivided share of the tenements in the city of London; and upon this conveyance the title of the vendor depended.

One of the objections taken to the title was in the following words:—"that Samuel Strudwick, the vendor, in 1819, of two-eighth parts of the estate, was an alien, and incapable of conveying them, such shares having been the property of Samuel Strudwick, his grand father, who was settled in America at the time of the separation of the two countries in 1783, and who was alleged to have devised them to his son William Francis Strudwick, who was an American, and died there in 1810 intestate, leaving the said Samuel Strudwick, the grand son, his heir at law; and that *no proof had [*665] been shown that after the separation, Samuel Strudwick, the grand

father, or William Francis Strudwick, was a subject of the king of Great Britain."

The question turned upon the construction of the treaty of peace between Great Britain and the United States, signed at London on the 19th of November, 1794, and of the 37 G. 3, c. 97, which was passed for the purpose of carrying the treaty into execution.

By the first article of that treaty it was agreed, "that there should be a firm, inviolable, and universal peace between Great Britain and the United States."

The second article, after some regulations relative to the withdrawal of the British troops, declared, "that the settlers and traders within the precincts of the posts from which the British troops were to be withdrawn, should continue to enjoy their property of every kind, and be at liberty to remain there, or to remove their effects, and to sell or retain their lands and property at their discretion; that such of them as should continue to reside within the boundary line, should not be compelled to become citizens of the United States, or to take any oath of allegiance to the government thereof, but should be at full liberty so to do, if they thought proper, and should declare their election within one year after the evacuation aforesaid; and that all persons who should continue there after the expiration of the year, without having declared their intention of remaining subjects to his British majesty, should be considered as having elected to become citizens of the States."

The third, fourth, and fifth articles related to the boundaries of the new states, the navigation of the rivers, &c.; and the sixth, seventh, and eighth, to the adjustment of the pecuniary claims of individuals.

[*666] *The ninth article enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives. The terms of it, relative to Americans holding lands in England, were, "that American citizens, who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to those whom they should please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens."

And by the tenth article it was stipulated, "that neither debts due from individuals of the one nation to the individuals of the other, nor shares nor moneys which they might have in the public funds or private banks, shall, even in any event of war or national differences, be sequestrated or confiscated; it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other, and in their respective governments, shall ever be destroyed or impaired by national authority, on account of national differences and discontents."

The subsequent articles of the treaty, down to the twenty-eighth, contained various stipulations relative to navigation, and the mutual delivery up to jus-

tice of persons charged with murder or forgery. The twenty-eighth article declared, "that the first ten articles of the treaty should be permanent, and that the subsequent articles, except the twelfth," (which related to the intercourse with the West Indies, and was to continue in force for two years after the then war,) "should be limited in their duration to twelve years, to be computed from the day on which the ratifications of the treaty should be exchanged, subject to the renewal of *the negotiations at a period [*667] therein mentioned; but if his majesty and the United States should not be able to agree on a new arrangement, in that case all the articles of the treaty, except the first ten, should then cease and expire together."

In 1797 the 37 G. 3, c. 97, was passed, which is intituled "An act for carrying into execution the treaty of amity, commerce, and navigation, concluded between his majesty and the United States of America." It contained the following clauses:—

"Sect. 24. And whereas by the ninth article of the said treaty, it was agreed that British subjects, who then held lands in the territories of the said United States, and American citizens, who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives; and that neither they nor their heirs or assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens; be it therefore enacted, by the authority aforesaid, that all lands, tenements, and hereditaments in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said 28th of October, 1795, (being the day of the exchange of the ratification of the said treaty between his majesty and the said United States,) were held by American citizens, shall be held and enjoyed, granted, sold, and devised, according to the stipulations and agreements contained in the said article; any law, custom, or usage to the contrary notwithstanding.

"Sect. 25. Provided always, that nothing herein contained shall extend, or be construed to extend, to give any right, title, or privilege to any person, not being a *natural born subject of this realm, which such person [*668] would not have been entitled to if this act had not been made, other than and except such rights, titles, and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being either a natural born subject of this realm, or a citizen of the said United States, any right, title, or privilege, to which such person would not have been entitled if this act had not been made.

"Sect. 27. That this act shall continue in force so long as the said treaty between his majesty and the United States of America shall continue in force, and no longer."

This act was continued by the 15 G. 3, c. 35, which,—after reciting that

the 37 G. 3, c. 97, " was to continue in force so long as the said treaty should continue in force, and no longer; which treaty, or so much of it as relates to the matters contained in the said act, has now ceased and determined: and it is expedient that the liberty of navigation and commerce between the people of this kingdom and the people of the United States of America, should continue for a limited time, in the same manner and under the same limitations and conditions as are specified in the said act,"—enacted that " the said act, and every thing therein contained, shall, notwithstanding the said treaty has ceased and determined, be deemed and taken to be and to have been in full force and effect, and shall so continue in force until the 1st of June, 1806."

The 37 G. 3, c. 97, was subsequently continued from time to time by the 46 G. 3, c. 16, the 47 G. 3, sess. 2, c. 2, and, finally, by the 48 G. 3,
[*669] c. 6, to the end of the *then present session of parliament. That session terminated in the same year; and no act was afterwards passed to revive or prolong the operation of the treaty.

The point argued was, whether the twenty-fourth section of the 37 G. 3, c. 97, taken in connection with the ninth article of the treaty, continued in operation, so as to remove the incapacity of holding and transmitting lands in England, which would otherwise have attached on William Francis Strudwick and Samuel Strudwick, the grand children, as aliens.

Mr. *Bickersteth*, Mr. *Pemberton*, Mr. *Tyrrell*, Mr. *Wright*, and Mr. *Wood*, in support of the objection to the title:—The treaty of 1783 dissolved the tie of allegiance which had previously subsisted between the crown of England and the individuals who then became American citizens; they and their descendants, born out of the British dominions, were thenceforth aliens; and accordingly *Doe* v. *Acklam*(*a*) has established, that a person, born in the United States since 1783, cannot inherit lands in England. *Doe d. Auchmuty* v. *Mulcaster*.(*b*) William Francis Strudwick, and Samuel Strudwick, the grand son, were clearly aliens. The only distinction between the present case and that of *Doe* v. *Acklam* is, that the freehold of the tenement in question was not in an English subject on the 28th of October, 1795, but in an American citizen. Now it is true, that, as to such lands, the incapacity of alienage was removed by the 37 G. 3, c. 97; and so long as that statute was in operation, American citizens might hold, grant, sell, or devise these lands in the same manner as if they were natives. But by the twenty-seventh section the act is to
[*670] continue in force *only so long as the treaty shall be in force, and no longer; and the single question, therefore, is, whether the treaty was or was not in force in 1819. On this point we have a legislative declaration in 1805. The 45 G. 3, c. 35, says in the preamble, " which treaty, or so much of it as relates to the matters contained in the said act (*i. e.* the 37 G. 3, c. 97,) has now ceased and determined;" and, among the matters contained in the said act, was the stipulation for excluding the incapacity arising from

(*a*) 2 B. & C. 779. (*b*) 5 B. & C. 771.

alienage; and the same statute declares in the enacting clause, that "the said treaty has ceased and determined." By that statute, and two subsequent acts, the 37 G. 3, was revived both retrospectively and prospectively; but it finally expired with the session of 1808. In 1812 war broke out between the two countries, which continued to rage till a new treaty was concluded in 1814. It is impossible to suggest that the treaty was "continuing in force" in 1813; it necessarily ceased with the commencement of the war. The 37 G. 3, c. 97, could not continue in operation a moment longer, without violating the plainest words of the act. William Francis Strudwick became then and remained ever afterwards subject to all the incapacities of alienage.

It was said before the master, that the first ten articles of the treaty were to be "permanent," which was construed as synonymous with "perpetual;" but that is a construction which the twenty-eighth article does not admit of. The very first article is, "that there should be a firm and universal peace between Great Britain and the United States;" that is the first of the articles supposed to be ever enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word "permanent" is used, not as synonymous with "perpetual or everlasting," but in opposition to a period of duration expressly limited. *The greater number of the articles of [*671] the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force; but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation.

Even if it were to be held, in consequence of the language of the twenty-eighth article, that the intention of the framers of the treaty was to make the ninth article perpetual, there is nothing in the act of parliament to give it that endurance. The act makes no mention of the twenty-eighth article of the treaty, which remains, therefore, a mere stipulation of the crown, and cannot create or extend an exemption from any disability imposed by the law of the land. The continuance of the exemption could not be prolonged beyond the duration of the act; the act was to endure only so long as "this treaty," that is, the treaty of amity, commerce, and navigation concluded between his majesty and the United States of North America, should be in force, and, most unquestionably that treaty was not in force, when his majesty and the United States were carrying on hostilities against each other both by sea and land.

The construction contended for on the other side would lead to most inconvenient results. One consequence of it would be, that all the lands which, on the 28th of October, 1795, belonged to Americans, are taken for ever out of the operation of the general law of England, and may, in all time to come, be transmitted to aliens by descent, devise, or conveyance.

Mr. *Wigram*, in support of the same line of arguments, submitted that the treaty could not be deemed to be in force, unless it was in force as a

[*672] whole; that it could *not be in force as a whole, after the most important provisions in it had been broken; and, on the contrary, that it ceased to be in force as a whole, when the peace, the stipulation for which constituted the basis of the arrangement, was exchanged for a state of war. He cited Vattel,(a)—"We cannot consider the several articles of the same treaty as so many particular and independent treaties: for though we do not see the immediate connection between every one of these articles, they are all connected by this common relation, that the contracting powers pass them with a view to each other, by way of compensation. I should never perhaps, have passed this article, if my ally had not granted me another, which, in its own nature, has no relation to it. Every thing comprehended in the same treaty has then the force and nature of reciprocal promises, at least if they are not excepted in due form. Grotius says, very well, that all the articles of a treaty have the force of conditions, which by a default are rendered null."

Mr. *Preston* and Mr. *Dixon*, Mr. *Tinney* and Mr. *Garratt*, in support of the title:—The treaty contains articles of two different descriptions; some of them being temporary, and others of them being intended to be of perpetual obligation. Of those which were temporary, some were to last for a limited period; such as the various regulations concerning trade and navigation; and some were to continue so long as peace subsisted, but, being inconsistent with a state of war, would necessarily expire with the commencement of hostilities. There were other stipulations, which were to remain in force in all time to come, unaffected by the contingency of peace or war. For instance, there are clauses for fixing the boundaries [*673] of the United States. Were the boundaries so fixed *to cease to be the boundaries, the moment that hostilities broke out? The tenth article provides that debts due to individuals, and moneys which they may have in the public funds or private banks, shall not be confiscated in the event of war: that is a stipulation which, from the nature of things, as well as from the plain import of the terms, was to be a binding obligation in war as well as peace; for it was only to a state of war that it was at all applicable; and, in sound construction, a similar force must be given to the immediately preceding article, on which the present question arises. It was intended to provide for the inconvenience which must naturally arise from the division of one empire into two independent states, the subjects of each which hold property situated within the territorial limits of the other; and with that view, it declares that American citizens, who then held lands within the dominions of his majesty, should continue to hold them, and have power to grant, sell or devise them as if they were natives, and that neither they, nor their heirs or assigns, should, in respect of their lands, be regarded as aliens. The effect of it is to exclude, and to exclude for ever, the principle of alienage as to cer-

(a) Book II, c. 13, s. 202.

tain persons and certain lands: there is no limitation to its operation; it is not confined to a state of peace, or to the individuals who then held the lands; it includes their heirs and assigns: they, their heirs, and assigns are, with respect to such lands, to be considered as natives; and, being considered as natives, their title to hold the lands could not be affected by the breaking out of war between the two countries. The twenty-fourth article tends still further to show that some of the stipulations, and among these, the ninth article, were meant to be of perpetual endurance.

Now the effect of the twenty-fourth section of the act of parliament is to give the force of law to the ninth *article of the treaty; and if that [*674] article, according to the sound construction of the treaty, was to be of perpetual obligation, the enactment of the legislature, carrying into effect that which the king had agreed to do, but which his prerogative was not competent to accomplish, has declared that Americans, who held lands within the dominions of his majesty on the 28d of October, 1795, their heirs and assigns, shall in all time to come hold and enjoy them as natives. It is true that the twenty-seventh section has said, that the act shall continue in force only so long as the treaty of peace continues in force; but that section must necessarily be confined to those stipulations which were either of limited duration, or were in their nature such as to be entirely dependant on the existence of peace.

It has been argued that the recitals contained in the 45 G. 3, c. 35, and the two subsequent acts, have put a legislative construction on the 37 G. 3, c. 95, and have declared that the treaty, and consequently the latter act, had ceased and determined. But the operation of a statute is not to be restrained by the recital of a subsequent statute. *Dore* v. *Gray*.(a) Besides, the acts of the 45 G. 3, and the following years contemplated only those provisions of the treaty, which related to commerce and navigation, and were to expire at the end of twelve years, unless they were expressly renewed for a further period.

The ninth article was more beneficial to English subjects than to American citizens; and any restriction of its fair operation would be a public mischief, inasmuch as it would naturally lead America to adopt a similar restriction of the reciprocal privilege granted to the subjects of the British crown.

*Suppose that an American citizen who, on the 28th of October, [*675] 1705, held lands in England, died, leaving an elder son born in America, and a younger son born in England. Had the treaty and the act not been made, the younger son, on the father's death, would have inherited the lands: under the treaty and the act the eldest son was heir, and as such entitled to the property. Is it to be said that, if a war afterwards break out, his interest is to cease, and a title is to accrue to the crown, which never could have had a pretext of claim, if the devolution of the property had been regulated by the common law?

Mr. *Bickersteth*, in reply.

(a) 2 T. R. 365.

1830.—Sutton v. Sutton.

THE MASTER OF THE ROLLS :—The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

The act of the 37 G. 3, gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a [*676] state of peace or war, then the act of parliament must be held, *in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

I am of opinion, therefore, in favor of the title, and consider that the heirs and assigns of every American, who held lands in Great Britain at the time mentioned in the act of the 37 G. 3, are, as far as regards those lands, to be treated, not as aliens, but as native subjects.[1]

After the decision on the point of law, a question was raised, whether, regard being had to the mode in which the property had been dealt with and the title deduced, William Francis Strudwick did, in fact, hold the lands and hereditaments, which were the subject of the contract, on the 26th of October, 1795; and on this point a reference was directed to the master.

[1] The title must have been in the claimant or his ancestors at the time of the making of the treaty. *Harden* v. *Fisher*, 1 Wheat. 300; *Blight's Lessee* v. *Rochester*, 7 Wheat. 535. See further as to the construction of the ninth article of the treaty of 1794, *New York* v. *Clarke*, 3 Wheat. 1; *Orr* v. *Hodgson*, 4 Wheat. 453; *The Society for propagating the Gospel* v. *New Haven*, 8 Wheat. 464; *Craig* v. *Radford*, 3 Wheat. 494; *Hughes* v. *Edwards*, 9 Wheat. 489; *Society for propagating the Gospel* v. *Wheeler*, 2 Gallison, 127; *Shanks* v. *Dupont*, 3 Peters, 242; *Fisher* v. *Harnden* 1 Paine, 55; *Kelly* v. *Harrison*, 2 Johns. Cas. 29; *Jackson* v *Lunn*, 3 Johns. Cas. 109; *Jackson* v. *Wright*, 4 Johns. Rep. 75; *Jackson* v. *Decker*, 11 Johns. Rep. 418; *Megrath* v *Adm'rs. of Robertson*, 1 Desau. 445.

*Newbold v. Roadknight.[1] [*677]

Rolls.—1830; July 26; August 2.

A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are adeemed, if the testator sell the estate in his lifetime.

William Norris, by his will dated the 24th of January, 1824, gave and devised as follows:—"I give and devise all my messuages, closes, lands, tenements, and hereditaments, situate, lying, and being in Eathorpe in the said county of Warwick, unto William Roadknight and Robert Welchman, their heirs and assigns, upon trust, as soon as conveniently may be after my decease, absolutely to sell and dispose of the same either by public auction or private contract, and either together or in parcels, for the most money and best price or prices that can or may be reasonably obtained for the same; and after defraying thereout the costs, charges, and expenses incident to and attending such sale or sales, and in making out good and perfect titles to the purchaser or purchasers thereof, upon trust to pay unto Mr. Thomas Newbold of Baggington, the husband of my daughter Elizabeth Newbold, the sum of 3000*l.*, which I hereby give and bequeath to him accordingly to and for his own use and benefit; and then, upon trust to pay and divide the surplus of the said last mentioned purchase money unto and amongst all and every the child and children of my late son Thomas Norris, and the child and children of my said daughter Elizabeth Newbold, equally to be divided between them, when and as they shall respectively attain their ages of twenty-one years, with benefit of survivorship and accruer amongst them. I give and bequeath unto the said William Roadknight and Robert Welchman the sum of 30*l.* each for their own use and benefit, as a token of my respect and esteem for them. I give and bequeath all my household *goods and furniture, [*678] plate, linen, china, cattle, stock, crops, money, debts, securities for money, and all other my personal estate and effects whatsoever and wheresoever unto the said William Roadknight and Robert Welchman, their executors, administrators, and assigns, upon trust that they do and shall, as soon as conveniently may be after my decease, convert such part thereof as is not in money into money, and collect and call in my debts and securities, and stand and be possessed of the money so to be received and produced, and of the surplus of the money to be produced from the sale of the messuage, closes, lands, tenements, and hereditaments which I have lately purchased at Marton, upon trust, in the first place, to pay my just debts, funeral expenses, and the expenses of proving and carrying into execution this my will; and then upon trust that they do and shall pay and divide the residue of the said money unto and amongst all and every the child and children of my said late son Thomas

[1] S. C. Taml. 492.

Norris, and the child and children of my said daughter Elizabeth Newbold, equally to be divided between and amongst them, when and as they should respectively attain their age or ages of twenty-one years, with benefit of survivorship and accruer amongst them." And he appointed Roadknight and Welchman his executors.

The testator afterwards made a codicil, bearing date the 2d of February, 1826, by which, after reciting that the estate at Marton had been conveyed to him, and devising it to Roadknight and Welchman, and their heirs upon the trusts expressed in his will, he gave to a servant a small pecuniary legacy, to be paid within a month after his decease out of his personal estate; and he added, "and I do in all other respects confirm my said last will and testament."

[*679] In the interval between the date of will and the date of the codicil, the testator had sold the lands in Eathorpe, and conveyed them to the purchaser; and the question in the cause was, whether the bequest of the 3000*l.* to Thomas Newbold was thereby adeemed.

Mr. *Pemberton* and Mr. *Wakefield*, for the plaintiff. It has been decided, that, if a testator bequeaths a sum of money, to be raised by the sale of a particular estate, and if it happens that at his death he has no interest in that estate, the bequest is nevertheless payable out of his general assets: *Fowler* v. *Willoughby*,(*a*) *Broome* v. *Monck*.(*b*) In *Fowler* v. *Willoughby* the money could not be raised by the sale of the estate, because the contract of purchase into which the testator had entered, could not be completed; here it cannot be raised in the particular mode pointed out by the will, because the lands have been converted into money in the testator's lifetime; but the difference in the mode in which the specific fund happens to fail does not constitute any essential distinction between the cases. If the testator had bequeathed to Thomas Newbold 3000*l.* to be raised by the sale of the lands at Eathorpe, the legacy would not have failed by reason of the circumstance that the testator afterwards parted with all his interest in those lands; and where is the substantial difference between a direction to pay to a man 3000*l.* to be raised by the sale of certain lands, and a direction that trustees, to whom those lands are devised upon trust to sell, shall out of the proceeds pay to him the same sum?

The language of the codicil strengthens the claim of the plaintiff.

[*680] The testator there says, that in all other *respects he confirms his will; and one of the points, on which this will is thus declared to be confirmed, is the gift of 3000*l.* to Thomas Newbold.

Mr. *Tinney* and Mr *Jeremy*, contra:—The words of confirmation in the codicil cannot give validity to dispositions contained in the will, which had previously failed. *Crosbie* v. *M'Doual*,(*c*) *Izard* v. *Hurst*.(*d*) When the testator sold the lands in Eathorpe, and conveyed them to the purchaser, his

(*a*) 2 Sim. & Stu. 354. (*b*) 10 Ves. 597. (*c*) 4 Ves. 610. (*d*) 2 Freeman, 224.

devise of these lands to trustees necessarily failed; and the trusts which had been declared of the money to arise from the sale of them, could no longer take effect. *Page* v. *Leapingwell*,(*a*) *Hancox* v. *Abbey*.(*b*) The present case is governed by the decision in *Arnald* v. *Arnald*.(*c*)

Mr. *Harwood*, for formal parties.

August 2.—THE MASTER OF THE ROLLS:—The gift to one of a sum of money, part of the produce of real estate directed to be sold, followed by a gift of the residue of the purchase money to others, is substantially a gift of the estate, and not a gift of legacies with a collateral charge upon the estate.[1] This distinguishes the present case from *Fowler* v. *Willoughby*: and the legacy of 3000*l.* to Thomas Newbold is, therefore, adeemed.[2]

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*DRIVER *v.* FERRAND. [*681]

ROLLS.—1830; July 30, August 2.

In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect.

THE will of John Jackson was to the following effect:—"I John Jackson, of Guiseley, &c. do make and declare this my last will and testament, in manner and form following: and first, as touching the disposition of my real estate, I give and devise the same as follows; (that is to say)"—He the devised certain closes to John Ferrand in fee; and proceeded as follows:—"And as for and concerning the hereinafter mentioned messuages, lands, tenements, and hereditaments which I give and devise to John Ferrand, it is my will to charge, and I hereby make chargeable, the same and every part thereof with the payment, yearly and every year, of the sum of 5*l.*, the first payment to be made in one year from the day of my decease, and to be continued yearly afterwards, until all claims and demands whatsoever against all or any part of my estate be and are liquidated, paid, and satisfied, and when and as soon as that is the case, then the said yearly payments of 5*l.* shall cease. And I give and devise, subject nevertheless to the said payment yearly of 5*l.*, unto the said John Ferrand and his assigns for and during the term of his natural life, all those seven closes of land called Shaw Sides; also all those two closes of land called the Allotment; and also all that other close of land called Willis Gills; and also all that my dwelling house, together with barns, stables, and other outbuildings thereto adjoining and belonging; also all those two pieces or parcels of ground adjoining my dwelling house, called the Crofts, (all the said last mentioned property is situate, lying, and being in

(*a*) 18 Ves. 463. (*b*) 11 Ves. 179. (*c*) 1 Bro. C. C. 401.

[1] Vide *Bourn* v. *Gibbs*, ante, 614. [2] Vide *Hayes* v. *Hayes*, 1 Keen, 97.

Guiseley aforesaid, and in my own occupation,) to have and to hold
[*682] the said last *mentioned premises, and every part thereof, with their and every of their rights, members, and appurtenances to him the said John Ferrand and his assigns for and during the term of his natural life ;" with remainder to his first and other sons in tail male ; remainder to the right heirs of John Ferrand. "As also," continued the testator, "for and concerning all other my messuages, cottages, closes, lands, tenements, and hereditaments whatsoever, lying and being in the county of York, and in whose tenures and occupations soever the same and every part thereof may be, with their and every of their rights, members, and appurtenances, unto the said John Ferrand and David Smith, and their heirs, in trust to take and receive, and it is my will that they do, shall, and may take and receive the rents, issues, and profits arising from and out of the same, and apply the moneys so arising for the liquidating, paying off, and discharging and satisfying all and every the just debts, claims, and demands, of what nature or kind soever the same may be, against all or any part of my real estate, whether the said debts, claims, and demands be or are on promissory notes, mortgages, or otherwise ; and also for liquidating, paying off, and discharging and satisfying the several sums of money which I give and bequeath as legacies, as well as funeral and testamentary expenses, which my executors may incur in the execution and performance of the trusts hereby in them reposed ; and when and as soon as all debts, claims, and demands as aforesaid are liquidated, paid off, discharged, and satisfied, then I give and devise all that part of my real estate so left in trust as aforesaid as follows : (that is to say)," &c.—The testator next devised two closes to his cousin Christopher Driver for life ; remainder to the first and other sons of Christopher Driver in tail male ; remainder to the right heirs of Christopher Driver. "And as for and concerning all other my mes-
[*683] suages, cottages, *mills, closes, lands, tenements, and hereditaments, not herebefore given and devised whatsoever, lying and being in the county of York, in whose tenures or occupations soever the same are or be, whereof I am in any wise seised, or have power to dispose, and whereto or wherein I am in any wise entitled or interested, of or for any estate of freehold or inheritance in possession, reversion or expectancy, I give and devise the same and every part thereof, with their and every of their rights, members, and appurtenances, unto my cousin John Driver for life ;" remainder to the first and other sons of John Driver, successively in tail male ; remainder to the right heirs of John Driver. Powers of leasing were next given to the persons, who, under the preceding limitations, should have an estate in possession in any of the devised premises ; and the will then proceeded, "and as touching my personal estate, I dispose thereof as follows (that is to say) : all my household furniture of every description, farming stock, as hay and corn, milch cows, horses, manure, implements of husbandry, and whatever may be on the premises belonging to me at the time of my decease, as well as all moneys, securities for moneys, and arrears of rent, I give and bequeath the

same and every part thereof to the said John Ferrand; also I give and bequeath to Ann Ferrand, daughter of the said John Ferrand, the sum of 100*l.*, to be paid to her by my executors on her attaining the age of twenty-one years; also I give and bequeath to Sarah Neale the sum of 20*l.*, to be paid to her by my executors in twelve months after my decease; also I give and bequeath to the trustees for the time being of the Guiseley Sunday school the sum of 100*l.*, to be paid to them by my executors as soon as convenient after my decease; the said sum of money I give for the purpose of liquidating the debt on the said school; also I give and bequeath to William Whitfield, now or late of Schemnitz in Saxony, the sum of 5*s.*, *to be given to [*684] him by my executor when called upon for that purpose: also I give and bequeath to each of my executors the sum of 50*l.*; and I do nominate and appoint the said John Ferrand and David Smith executors of this my last will and testament; and it is my will and mind that the said John Ferrand and David Smith, their heirs, executors, and administrators respectively, shall deduct and receive to their own uses out of the rents and profits of that part of my real estate set apart for such purposes as aforesaid, all their reasonable costs and charges in and about the management and performance of the trusts hereby in them reposed concerning the same."

The question in the cause was, whether the personal estate was exempted from the payment of all debts, funeral expenses, and legacies?

It was argued by Mr. *Pemberton* on the one side, and by Mr. *Bickersteth* on the other.

In support of the proposition, that the real estate was intended to be the primary fund for the payment of debts, funeral expenses, and legacies, *Bootle* v. *Blundell*,(*a*) *Greene* v. *Greene*,(*b*) *Michell* v. *Michell*,(*c*) were cited.

On the other hand, it was said that the present case was distinguishable from the cases cited, by the particular frame and phraseology of the will; in particular, there was here no direction for the sale of any part of the real estate, and it was by his executors that the legacies were to be paid. The latter circumstance raised a presumption, *in favor of the general [*685] rule of law, that the legacies were to be borne by the personal estate as the primary fund.

August 2.—The Master of the Rolls:—In order to exempt the personal estate there must be clear intention; and I think such intention is to be found in this will. In an early part of the will, the testator devises certain real estates to John Ferrand and David Smith, whom he afterwards names executors, in trust "for the liquidating, paying off, and discharging and satisfying all and every the just debts, claims, and demands of what nature or kind soever the same may be, against all or any part of my real estate, whether the said debts, claims, and demands be or are on promissory notes, mortgages,

(*a*) 1 Mer. 193. (*b*, 4 Mad. 148. (*c*) 5 Mad. 69.

or otherwise ; and also for liquidating, paying off, discharging, and satisfying the several sums of money which I give and bequeath as legacies, as well as funeral and testamentary expenses, and the expenses which my executors may incur in performance of the trusts hereby reposed in them ; and when and so soon as all debts, claims, and demands as aforesaid, are liquidated, paid, and satisfied," he gives and devises in manner therein mentioned, the real estates so charged. It would at first seem, that he meant to charge this part of his real estate only with debts which, in their nature, affected real estate ; but inasmuch as he enumerates debts which do not in their nature affect real estate, and charges these estates expressly with legacies, and funeral and testamentary expenses, and the expenses of his executors in the execution of his will, it must be intended that he meant to charge these real estates with all debts.

[*686] *In a subsequent part of his will he uses the following expressions :—

"And as touching my personal estate, I dispose thereof as follows ; that is to say, all my household furniture of every description, farming stock, as hay and corn, milch cows, horses, manure, implements of husbandry, and whatever may be on the premises belonging to me at the time of my decease, as well as all moneys, securities for moneys, and arrears of rent, I give and bequeath the same, and every part thereof, to the said John Ferrand." It would be, therefore, utterly inconsistent with the intention here expressed, that this personal estate should be applied to the payment of the debts, in exoneration of the real estate before charged with them.

The testator afterwards gives certain pecuniary legacies, to be paid by his executors ; but it is to be recollected that his executors were the trustees of the real estate charged with the legacies : and that he had here in view the real estate, is to be inferred also from a direction which follows, that his executors are to retain out of the real estate their costs and charges incurred in the execution of their trust. Upon the whole, I am of opinion that it was the manifest intention of this testator, that the real estate, devised for that purpose, should exonerate the personal estate, in favor of the specific legatee of that estate, from all debts and other charges, to which the personal estate is by law previously liable.[1]

[1] Vide *Walker* v. *Hardwick*, 1 Myl. & K. 396. *Blount* v. *Hipkins*, 7 Sim. 43. *Rhodes* v. *Rudge*, 1 Sim. 85, n. 1, 2. (The case of *Rogers* v. *Rogers*, 1 Paige, 188, is referred to in the note 2, 1 Sim. 85, where it is, indeed, stated that a mortgage was a primary charge on the land devised ; but that position was evidently suggested in reference to the revised statutes of N. Y., which, doubtless from some all sufficient reason, have in this instance released the personalty from its primary liability. If the mortgage were given as security for the purchase money, one case is presented. If it were given for the purpose of raising money, a totally different case is presented) 3 Myl. & Cr. 772, n. 1. *Dawes* v. *Scott*, 5 Russ. 32.

*David v. Rees. [*687]

Rolls.—1830; July 30, August 2.

A testator having by his will given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift; the gift in remainder is not thereby accelerated; but its value is to be computed according to the price of the stock, at the time of the testator's death, when, but for the substitution the gift of the prior life interest would have taken effect.

John Cook, by his will dated the 21st of January, 1803, gave as follows:—"I order and direct my executors hereinafter named, to pay and apply the interest, dividends, and produce of 600*l.* sterling, now invested in the funds of this kingdom, unto my father and mother, Thomas Cook and Jennett Cook, for their natural lives, and the life of the survivor or longest liver of them both, by equal half-yearly payments; the first payment thereof to be made within six months next after my decease: and my will is, that the said annuity shall be paid unto the said Thomas Cook and Jennett Cook free of taxes and all other deductions parliamentary or otherwise: and from and after the several deceases of the said Thomas Cook and Jennett Cook, I give and bequeath the interest and dividends of the said sum of 600*l.* unto my sister Mary, the wife of Watkin David, for and during the term of her natural life, to be paid her free and clear of all taxes and deductions, by equal half yearly payments; and from and after the decease of the said Mary David, my will and meaning is, that my executors hereinafter named shall apply, distribute, and dispose of the said principal sum of 600*l.* unto all and every the children of my sister Mary David, equally to be divided among them share and share alike."

The testator afterwards made a codicil to his will, dated the 12th of September, 1803, in the following words:—"This is a codicil to my last will and testament, and which I desire may be construed and deemed as part thereof. I give and devise, and bequeath unto *my father [*688] and mother, residing in Wales, the yearly sum of 30*l.* sterling, and to the survivor of them, for and during their natural lives, in lieu of what I have given them in and by my last will and testament."

There were two questions in the cause; first, whether the gifts to Mary David and her children were accelerated by the codicil, so that Mary David took an immediate life interest upon the death of the testator; and, secondly, whether the value of 600*l.* in stock was to be computed at the price which the stock bore at the death of the testator, or at the time when the legacy was due.

Mr. *Pemberton* and Mr. *Richards*, for the plaintiffs:—By the will of the testator as much stock is to be separated from the general mass of his assets as would then be purchased with 600*l.* sterling; and the fund thus created, subject to the life interests bequeathed to his father and mother, is given to

his sister during her life, with remainder to her children. The codicil annihilates the life interests bequeathed to the testator's father and mother: and as it was only for their sakes that the enjoyment of the income by the sister and her family was postponed, the effect of this annihilation is to accelerate the ultimate bequests. The fund must be separated from the general assets within a year after the death of the testator. Why should the separation have been directed to be made, if those for whose sake it is to be made are not to have the enjoyment of it till a period much more remote?

It was argued, contra, that the codicil had no object except to fix the income of the testator's father and mother at a sum certain, instead of leaving it, in some measure, subject to contingencies; that the will had ex-
[*689] pressly *declared that the interests of the sister and her children were to commence only at the death of the survivor of the father and mother; that to make them take effect from the death of the testator would be doing great violence to the language of the bequests; that the fund ought not to be separated from the assets till the purpose for which it was given rendered separation necessary; that the necessity did not arise till the death of the survivor of the father and mother; and, that the amount of stock, to which the sister and her children were entitled, was so much as 600*l.* sterling would have purchased at the time of the death of such survivor.

August 2.—The Master of the Rolls:—The gift to Mary David being in express terms after the death of the survivor of Thomas Cook and Jennett Cook, I cannot infer that the testator meant an immediate gift to her, merely because he has substituted another provision for Thomas Cook and Jennett Cook, which differs little from the prior life estate given to them, except in the certainty of the amount.

The gift to Mary David and her children is of so much stock as 600*l.* sterling would have purchased at the death of the testator, when the life interest first given to the Cooks was to commence.[1]

[*690] *Lear *v.* Leggett.

1830; July 26.

Where stock was given upon trust for A. for life, and after his decease, for his children, with a proviso, that A.'s life interest should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge, or affect to charge, affect or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled: Held, that on A.'s bankruptcy, his life interest passed to his assignees, to the exclusion of his children.

A testator bequeathed to trustees a sum of 23,333*l.* 6*s.* 8*d.* 3 per cent.

[1] Vide *Banks* v. *Sladen*, ante, 216, 222, note. *Sheffield* v. *The Earl of Coventry*, 2 Russ. & M. 317.

consols, upon trust for his wife for life; and after her decease, upon trust for his son and daughters, Alexander Goudge, Elizabeth Bathe, and Sarah Saunders, in equal shares, for their respective lives; and immediately after the decease of his son and daughters respectively, he directed that one-third part of the stock should be paid and transferred equally unto and amongst all the children *per stirpes*, and not *per capita*, of his son and daughters respectively who should live to attain the age of twenty-one years; and after the several deceases of the testator's wife and the parents of such children, the trustees were directed to receive the dividends accruing upon the respective shares of the children, and to apply the same for their maintenance and education, till their shares of the principal should severally become payable. The will also contained this clause,—"Provided always nevertheless, and my mind and will is, that the several provisions hereinbefore and hereinafter given for my said son and daughters during their respective lives shall not, nor shall any part thereof respectively, be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt; and in case they, or any, or either of them shall charge, or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then I do declare it to be my express will and meaning, that any such mortgage, sale, or other disposition or incumbrance, so to be made by them, or either or any of them, on his, her, or their life annuity, interest, or provision *shall operate as a complete forfeiture thereof, [*691] and of all benefit therein, during the remainder of their respective natural lives, and the same shall devolve upon the next successor, or person or persons in expectancy, as if he, she or they were then actually dead."

The testator died in the year 1806, and his widow died in 1821, leaving Alexander Goudge, the son, then of age. In the month of March, 1828, Alexander Goudge became a bankrupt. The only question was, whether, under the proviso in the will, the bankruptcy operated as a forfeiture of the bankrupt's life interest in his share of the dividends, for the benefit of his children, or whether that interest passed under the commission?

The Vice-Chancellor having decided that the bankrupt's interest in the legacy passed to his assignees,(*a*) an appeal was brought from his honor's decree.

Mr. *Horne* and Mr. *Knight*, for the appellants, the children of Alexander Goudge.

The *Solicitor General* and Mr. *Wigram*, for the assignees. On the one hand, it was said that the subject matter of the gift being personal estate, the construction was relieved from technical niceties; and the only question was, whether the intention to deprive the legatee of the power of alienation, and to devest him of the property, in case any attempt should be made to curtail or fetter his enjoyment of it personally, was expressed with sufficient

(*a*) 2 Sim. 479.

clearness to justify the court in giving it effect. The first words of the proviso, "that the several provisions shall not, nor shall any part [*692] thereof, be subject *to any alienation or disposition by sale, mortgage, or otherwise in any manner whatsoever," were extremely strong, and were large enough, standing alone, to extend to the alienation produced by bankruptcy. Could it be denied that if the bankrupt's interest were held to pass under the commission, that would be to make it subject to an "alienation or disposition?" Upon the subsequent words, which declared that any such mortgage, sale or other disposition by the tenant for life should operate as a complete forfeiture, the authority of *Dommett* v. *Bedford*,(a) recognized and fortified as it had recently been by *Cooper* v. *Wyatt*,(b) was conclusive. Those cases, indeed, went further, inasmuch as in them were not to be found the strong introductory words which, in construing the alienations or dispositions afterwards referred to, gave here a key to the testator's meaning, and amounted to an absolute prohibition against alienation of every kind. It was a narrow view of the subject, and one which had been exploded in *Cooper* v. *Wyatt*, to consider the alienation consequent on a commission of bankrupt as involuntary. An act of bankruptcy was as much the act of the party as any thing he could do; it was the necessary result of his own conduct; all its consequences, and, among the rest, the commission and assignment, were solely referrable to him.

On the other hand, it was argued, that a marked difference existed between words imposing a total prohibition, and words which merely prohibited alienations of a particular description, as for example, an alienation caused by the party's own act. Even where the prohibition was general, it could be of no avail, unless accompanied and enforced by a clause of for- [*693] feiture commensurate with the prohibitory words; for *the rule had long been settled that every restraint on alienation, annexed to a gift of property to a person *sui juris*, and not coupled with a declaration that the attempt to alien should determine the donee's interest, was simply void. The appellant's claim must, therefore, rest upon the second member of the proviso, but that fell greatly short of the former, as it only imposed the penalty of forfeiture in case of any mortgage, sale, or other disposition being made *by* the tenant for life, that is, by his own direct and immediate act. Clauses of forfeiture, especially where they tend to defeat the rights of creditors, were viewed with jealousy, and were always to be construed strictly. A commission of bankrupt, besides, was a proceeding *in invitum* (in that respect differing from a declaration of insolvency,) and, in the alienation which it wrought, the bankrupt passively submitted to the compulsory operation of the law. This distinction between voluntary and involuntary acts, taken by Sir W. Grant in *Shee* v. *Hale*,(c) was followed up by the

(a) 6 T. R. 684. 3 Ves. 149. (b) 5 Mad. 482. (c) 13 Ves. 404.

same judge in *Wilkinson* v. *Wilkinson*,(a) and afterwards received the sanction of Sir T. Plumer. The words in *Dommett* v. *Bedford*, (incorrectly stated in the marginal note) were large enough to include every kind of alienation; nevertheless that decision had been questioned.(b) *Cooper* v. *Wyatt* was an extremely special case, depending upon peculiar circumstances and expressions which prevent it from being an authority.

The Lord Chancellor said, that here the clause of forfeiture applied only to the prohibition against the acts of the parties themselves; "in case any or either of them shall charge or attempt to charge, affect, or *encumber the same," then the property was to go over. The prohibition in *Dommett* v. *Bedford* was expressed in much more general and comprehensive terms, and might well be construed to extend to alienations by act of law; yet even there the point had been considered doubtful. The same distinction, which the Master of the Rolls had stated in *Shee* v. *Hale*, had been subsequently much discussed, and was approved in *Wilkinson* v. *Wilkinson*. The decree of the Vice-Chancellor must, therefore, be affirmed.(c) [1] [*694]

Egerton v. Jones.

1830; August 5.

An exception to a report in favor of the title having been on argument allowed, leave was given to the plaintiff, some time afterwards, to go again before the master, for the purpose of bringing evidence to show that the objection which the court had sustained, was, in the circumstances, immaterial.

This suit was instituted in April, 1828, to compel the specific performance of a contract for the purchase of some building ground. The master reported that a good title could be made, or that the objections were sufficiently answered or waived prior to the filing of the bill. On the 18th of March, 1830, exceptions to the report were argued and allowed. On the 3d of May the plaintiff moved that it might be referred back to the master to inquire and state whether a good title could then be made; and upon that motion the Vice-Chancellor directed that the master should review his report, the plaintiff paying the costs of the application.(d)

(a) Coop. C. C. 259. 3 Swan. 515. (b) 3 Ves. 149.

(c) *Yarnold* v. *Moorhouse*, ante, 364. Some other authorities are cited in *Cooper* v. *Wyatt*, 5 Mad. 482; and in Mr. Simon's report of the principal case, 2 Sim. 479.

(d) 3 Sim. 392, and see *Andrew* v. *Andrew*, ibid. 390.

[1] A bequest subject to a clause of forfeiture, in case the legatee should mortgage, sell or expose to sale, assign or incumber, was held not to be forfeited by the bankruptcy of the legatee. *Whitfield* v. *Prickett*, 2 Keen, 608, 609, and note ibid. 2 Sim. 484, n. 1. *Graves* v. *Dolphin*, 1 Sim. 66. *Hallett* v. *Thompson*, 5 Paige, 583. *Green* v. *Spicer*, ante, 395.

The defendant moved that his honor's order might be discharged.

[*695] *The *Solicitor General* and Mr. *H. Randell*, for the motion, argued that a purchaser is not to be hung up during interminable investigations in the master's office, while the vendor is trying to patch a defective title. The plaintiff had chosen to rest her case upon the single question, whether a devise made by an ancestor, under whom she claimed as heiress at law, was or was not void for remoteness ;(*a*) and having been defeated upon that point, she now proposed to show that the validity of the devise was immaterial, inasmuch as all the limitations under it had failed. That answer to the objection ought to have been brought forward when the other point was discussed. A vendor who had deliberately adopted a certain course was not to be afterwards permitted to shift his ground, and to support his title by a case entirely different from the one he originally stated. If the defendant succeeded upon any one of fifty objections, the exceptions were allowed generally without going through them in detail; and although probably, if the plaintiff had asked it at the time, the master might have been directed to review his report, it was too late to come with such a motion at the end of six weeks. *Lechmere* v. *Brasier*(*b*) and *Dalby* v. *Pullen*(*c*) were authorities to show that under such circumstances a purchaser would be released.

Mr. *Wigram*, contra, distinguished *Lechmere* v. *Brasier* and *Dalby* v. *Pullen* and relied upon *Esdaile* v. *Stephenson*.(*d*)

The Lord Chancellor :—If the decision of the master, instead of

[*696] being favorable to the plaintiff, had been against her, as a matter *of course she would have been allowed to go back to support her title before him, upon the ground on which it is now sought to be sustained, and she ought not to be prejudiced by the master having decided in her favor. The order ought to have been made on the original application; but that has been rectified by the plaintiff's coming so soon after, and by her being compelled to pay the costs.(*e*)

Portman *v.* Mill.

1831; March 19.

Where the report is in favor of the title, the court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions and further directions were set down to come on together.

The master having in a suit for specific performance reported in favor of the title, a general exception was taken to the report. On argument it ap-

(*a*) 3 Sim. 409. (*b*) 2 J. & W. 287. (*c*) Supra, p. 296.
(*d*) 6 Mad. 366. Sugd. V. P. 207. (*e*) See the next case.

peared, that the estate, of which the lands in question formed a part was subject to a yearly rent-charge of 600*l.* to the plaintiff's mother. This objection had been urged without success before the master, but the Lord Chancellor considered it to be fatal, and the exception was accordingly allowed.[1]

The cause having been set down to come on for further directions at the same time with the exception, Sir *E. Sugden* and Mr. *Lynch* insisted that, inasmuch as the exception was now disposed of, and the further directions were regularly before the court, the purchaser was entitled to have the bill immediately dismissed.

Mr. *Pepys* and Mr. *R. Roupell*, contra, submitted that, as the plaintiff had been thrown off his guard by the report being in his favor, he ought not to be prejudiced by that circumstance; but that he ought to be [*697] allowed a limited period within which to produce a release of the rent-charge, or procure the annuitant's consent to join in the conveyance; and that for that purpose there should be a reference back to the master to review his report.

The following cases were cited:—*Esdaile* v. *Stephenson*,(*a*) *Fildes* v. *Hooker*,(*b*) *Brooke* v.——(*c*) *Egerton* v. *Jones*,(*d*) *Scott* v. *Hanson*,(*e*) *Lechmere* v. *Brasier*.(*g*)

The Lord Chancellor,(*h*) in giving judgment some days afterwards, observed that it would, in his opinion, be hard that the plaintiff should be placed in a worse situation by the report being in his favor, than if it had been the other way, when he would of course have taken the necessary steps for curing the defect in the title, before the further directions were brought on; and upon the authority of *Fildes* v. *Hooker*, he allowed the vendor till the middle of the ensuing term (the 27th day of April,) within which to remove the objection.[2]

(*a*) 6 Mad. 366. (*b*) 2 Mer. 424. (*c*) 4 Mad. 212.
(*d*) Ante. p. 694. (*e*) Ante, p. 128. (*g*) 2 J. & W. 287.
(*h*) Lord Brougham.

[1] Vide *Winne* v. *Reynolds*, 6 Paige, 407.
[2] Vide *Sidebotham* v. *Barrington*, 4 Beav. 110.

[*698] *HUNGATE v. GASCOIGNE.

1830; February 9, August 2.

To a bill by one who claimed estates either as heir *ex parte materna*, of G., the person last seised or as a remainderman under the limitations of some prior settlement, charging that G. had only a life interest in the property, as would appear if the contents of a certain deed executed in 1730, and within the power of the defendant, were set forth, and praying, besides discovery in aid of an ejectment, the removal of outstanding terms, and other relief connected with the action at law; a plea, that in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, and subsequently devised them to the defendant, but taking no notice of the deed of 1730, and not stating any part of its contents was overruled.

THE bill stated, that Sir Philip Hungate of Saxton, was in his lifetime seised in his demesne as of fee of and in the manor of Sherborne, and certain other real estates in the county of York, forming part of the ancient patrimonial property of the Hungate family; that he married, and had issue an only son, Francis; that Francis Hungate had issue two sons, Francis and William, (from the latter of whom the plaintiff claimed to be lineally descended, and to be the heir male of the body;) that the last mentioned Francis became Sir Francis Hungate, Bart., and had three children only, namely, Philip, Francis, and William, of whom the two latter died without issue; that the last mentioned Philip afterwards Sir Philip Hungate, Bart., had issue Francis, his eldest son (who succeeded to the baronetcy,) Philip and Charles; that the last mentioned Sir Francis Hungate had issue a daughter only, Mary Hungate, and died without issue male, whereupon the baronetcy devolved successively upon his younger brothers Philip Hungate and Charles Hungate, both of whom died without issue; that Mary Hungate intermarried with Sir Edward Gascoigne, and that Thomas Gascoigne, afterwards Sir T. Gascoigne, Bart., was the only issue of that marriage, who survived her; that Sir T. Gascoigne died without issue and intestate, in the year 1810; that upon the death of Sir T. Gascoigne, the plaintiff became and is his heir at law, *ex parte materna*, being lineally descended from the first mentioned Sir
[*699] Philip Hungate; for that the said *William Hungate, the second son of the said Francis Hungate, the first baronet of that name, and only son of the first Sir Philip, had issue two sons, Raufe and Thomas Hungate, of whom the former died without issue, and Thomas married, and had issue two sons; that of these, Thomas, the eldest, died without issue, and John the second, who was the plaintiff's grand father, had issue an eldest son, William who married Elizabeth Armin, and died leaving the plaintiff, his eldest son, and heir at law, and also the heir male of the body, and right heir of Sir Philip Hungate, the first baronet, and heir at law *ex parte materna* of Sir T. Gascoigne; that Sir T. Gascoigne died in some manner seised of the manor of Sherborne, and the other estates in the bill mentioned, and that the same had, either by descent or by some settlements or limitations unknown to the plaintiff, in some manner descended or been transmitted from

Sir Philip Hungate, the first baronet, through the several degrees of the Hungate family, or the eldest son, until they came to Sir T. Gascoigne, as the representative of the Hungate family by female descent as aforesaid, but how or in what manner, or whether by virtue of any limitations or entails, and for what estate or interest, the plaintiff is unable to set forth; that Sir Philip Hungate, the first baronet or some other of the before named persons in the direct line of the Hungate family, ancestors of Sir T. Gascoigne, by some settlements or devises, limited the estates in question in such manner as to create some limitations thereof to the heirs male of the body of Sir Philip Hungate, or of the said William Hungate, the second son of the said Francis, or to the use of some of the before mentioned lineal ancestors of Sir T. Gascoigne; and that by virtue thereof, the plaintiff, on the death of Sir T. Gascoigne without issue, became, either by the failure of issue male, or the failure of issue of the bodies of the persons comprised within the *prior limitations of such settlements or devises, entitled to the [*700] estates in question as heir male of the body of Sir Philip Hungate, or heir male of the body of some other of his (the plaintiff's) said lineal ancestors.

The bill charged, that after the intermarriage of Mary Hungate with Sir Edward Gascoigne, indentures of lease and release, bearing date March, 1730, and expressed to be made between Sir E. Gascoigne and dame Mary his wife, of the first part, dame Mary Hungate, widow of the second part, and divers other persons to the plaintiff unknown of the third and fourth parts, were made and executed, of the recitals, limitations, and material particulars whereof the plaintiff was ignorant; but he charged, that the said indentures comprised the manor of Sherborne, and the other patrimonial estates of the Hungate family, and that dame Mary Gascoigne had no power to settle or limit the estates therein comprised, she having only a life estate therein, expectant on the decease of her uncle Sir Charles Hungate, Bart., or otherwise an estate tail, subject to divers limitations over, which estate tail vested in the plaintiff on the decease of Sir T. Gascoigne without issue; that by virtue of some limitation contained in the said indentures, the plaintiff, on the failure of issue of Sir T. Gascoigne, became entitled to the manor of Sherborne, and the said other estates comprised therein, and in particular that it appeared therefrom, or from some recitals therein, that Sir T. Gascoigne took thereby or was otherwise entitled to an estate for life only in the said estates: that the said indentures were duly enrolled of record in the court of quarter sessions for the West Riding of the county of York, but that the record thereof, as the plaintiff on inquiry discovered, has been wrongfully abstracted or removed by some person unknown, and the plaintiff is now unable to obtain an inspection thereof, although *the same would materially assist him in establishing at law [*701] his title to the said estates: that Sir T. Gascoigne died seised in fee of the manor of Sherborne, and the other patrimonial estates of the Hungate family, and on his death, intestate and without issue, the plaintiff became

entitled thereto as his heir at law *ex parte materna:* that besides the Hungate estates, Sir T. Gascoigne died seised in fee simple of certain other estates, which he acquired by purchase, to which, on his death intestate and without issue, the plaintiff became entitled as his heir general: that in the year 1810, upon the death of Sir T. Gascoigne, the defendant Richard Oliver Gascoigne, who was a stranger in blood to Sir T. Gascoigne, but who has recently assumed the name of Gascoigne, entered into possession of the manor of Sherborne and the said other estates; that the plaintiff has recently brought an action of ejectment in the king's bench against the said R. O. Gascoigne for the recovery of the said manor and estates, but he has lately discovered that there are divers legal estates and terms for years of and in the said manor and estates, and in particular a certain term for 400*l.* years, now outstanding and vested in some persons unknown as trustees thereof, or which the said R. O. Gascoigne has procured to be assigned to himself, or to a trustee for him, or the deeds creating which are now in the hands of the defendant; and the plaintiff cannot, therefore, proceed to trial without the assistance of a court of equity in removing the said impediments, and that the defendant ought to be restrained from setting up the same; and that by reason of such outstanding legal estates, the title of the plaintiff has become and is of an equitable nature, and is peculiarly fitted for the cognizance of a court of equity.

The bill also set forth a great variety of other charges and pretences. [*702] In particular, it charged that it was *impossible for the plaintiff to proceed with effect to the trial of any action at law, for the recovery of the Hungate estates, until the defendant had made a full discovery and disclosure touching the several matters aforesaid; that if Sir T. Gascoigne ever did levy a fine or suffer a recovery of the Hungate estates, the same was void and inoperative, inasmuch as he had not in him any such estate or interest as enabled him to bar the ulterior limitations and defeat the rights of the plaintiff; that the defendant was in possession of the title deeds of the estates in question, and in particular of the indentures of 1730, and that the plaintiff, as heir of Sir T. Gascoigne, was entitled to call for the production and inspection of those deeds, so far as they tended to make out or support his title; that the defendant had in his possession or custody divers family or other settlements or devises containing limitations, in virtue of which the said estates, or some of them, were in some manner limited to the plaintiff, as heir male or right heir of the aforesaid baronets or one of them, or as lineal representative of the Hungate family; that the defendant was concerned in, or was privy to, the abstraction of the record of the indentures of 1730 from the registry, and knew what had become of such record, or was in possession thereof, or of some counterpart, or that he had made away with or suppressed the same.

The bill, in addition to a full discovery and disclosure, prayed a production and inspection of all deeds and instruments in the custody or power of the defendant relative to the said estates, and that the same might be particularly

set forth in a schedule; that the defendant might be restrained from setting up any outstanding terms in bar of the pending or any future ejectment *brought by the plaintiff; that an issue or action re- [*703] specting the matters aforesaid might be tried under the order of the court, with such directions and provisions as might be deemed reasonable; and that, in the event of the plaintiff obtaining a verdict, he might be put into the possession and enjoyment of the estates, and the defendant be ordered to deliver up to him all the title deeds and other muniments of title, and also to account for the rents and profits thereof, received for six years preceding the pending action of ejectment, and that an injunction and receiver might be granted in the mean time.

To this bill the defendant, R. O. Gascoigne, put in a plea which, in substance, stated, that Sir Thomas Gascoigne, in and before the month of April, 1766, was seised for an estate of inheritance in fee tail in possession, of and in the manor of Sherborne, in the bill called the ancient patrimonial estate of the Hungate family; and that being so seised and in possession, an indenture of bargain and sale thereof, bearing date the 2d day of April, 1766, was duly made and executed by and between the said Sir T. Gascoigne, baronet, therein described as only surviving son and heir as well of Sir Edward Gascoigne, baronet, deceased, as of dame Mary, his wife, also deceased, of the first part, Sir W. W. Bagot, baronet, of the second part, and W. A. Darwin, gentleman, of the third part; whereby, after reciting that by virtue of the settlement made some time after the marriage of the said Sir Edward Gascoigne and dame Mary his wife, in pursuance of certain precedent articles, or by virtue of the said Sir Edward Gascoigne's will, or some other assurance in the law, the said Sir T. Gascoigne was seised in fee tail in possession of and in the several hereditaments thereinafter particularized, and *which entail he was minded wholly to discontinue, and to gain to [*704] himself a fee simple of and in the same hereditaments respectively, it was witnessed, that for barring all such estates tail as aforesaid, and the remainders thereupon expectant or depending, of and in the barony, and several messuages, lands, &c., thereinafter mentioned, the said Sir T. Gascoigne, for the nominal consideration therein mentioned, did grant, bargain, and sell unto the said W. A. Darwin, his heirs and assigns, all that the barony, manor, or lordship of Sherborne, and all those several other manors or lordships therein particularly described, and all that the impropriate rectory of Saxton, and the advowson, right of presentation and patronage of, in, and to the parish church of Saxton aforesaid, and all those several messuages, lands, &c. of the said Sir T. Gascoigne therein described, to hold the same unto and to the use of the said W. A. Darwin, his heirs and assigns, to the intent that he might thereby become tenant of the freehold of the premises, in order that a common recovery might be suffered of the same before the end of Easter term then next, wherein the said Sir W. W. Bagot should be demandant, and the said W. A. Darwin tenant, and the said Sir T. Gascoigne

vouchee, who should vouch over the common vouchee; and it was thereby declared, that the recovery should enure to the only proper use and behoof of the said Sir T. Gascoigne, his heirs and assigns for ever: that the said indenture was enrolled in the court of common pleas, as of Easter term, in the sixth year of the reign of King George III., and was duly registered; and that, in Easter term, in the said year, a common recovery was duly suffered of the said barony, manors, or lordships, advowsons, messuages, lands, tenements, and hereditaments, with the appurtenances, in the court [*705] of common pleas at Westminster, to uses declared *thereof in and by the said indenture of bargain and sale, in which recovery the said Sir W. W. Bagot was demandant, the said W. A. Darwin tenant, and the said Sir T. Gascoigne vouchee, who duly vouched over the common vouchee: that by the virtue of the said indenture, the said Sir T. Gascoigne became and was seised of the said barony, manors, or lordships, and other hereditaments, to him and his heirs for an estate of inheritance in fee simple, and so continued till the time of his death: that the said Sir T. Gascoigne being so seised thereof, and being also seised for an estate of inheritance in fee simple, of and in divers other messuages, lands, &c., whereof he was the first purchaser, and whereof he continued to be seised in fee simple till the time of his death, duly made and published his last will and testament in writing, executed and attested as by law is required for passing freehold estates, and bearing date the first day of October, 1809, and thereby devised all his manors, messuages, lands, tenements, advowsons, and hereditaments whatsoever, to the use of the defendant and his issue in strict settlement, with divers remainders over: that the said Sir T. Gascoigne died in the year 1809, without having revoked or altered his said will, and that, thereupon, the defendant entered into possession of all the manors, messuages, lands, &c., comprised therein, and devised thereby, or into the receipt of the rents and profits thereof, and that he or those claiming under him hath or have ever since been and still are such in possession or receipt under and by virtue of the same will.

The plea averred that the barony, manors, lordships, and other hereditaments, whereof the said recovery was suffered, were the hereditaments in the bill called the ancient Hungate family estate, and that the [*706] *hereditaments whereof the said Sir T. Gascoigne was thereinbefore mentioned to have been the first purchaser, were the same which in the bill he was stated to have acquired as the first purchaser.

Mr. *Horne* and Mr. *Munro* for the plea:—This is a fishing bill of the worst description, and entitled to no favor. What the plaintiff says by his bill is tantamount to this,—"I am entitled to these estates in some way or other, and I must trouble you, the party in possession, to tell me how." After tracing the plaintiff's pedigree through a regular course of descent, and deducing his title as heir of the body and heir at law of the first Sir P. Hungate, and heir at law *ex parte materna* of Sir T. Gascoigne, the bill states the

death of Sir T. Gascoigne intestate and seised of the estates in question. Sir Thomas' seisin must have been in fee, in tail, or for life; if in fee, the plaintiff claims the property as his heir *ex parte materna*, or his heir general; if in tail or for life, then by virtue of the limitations contained in some supposed settlement or devise, to the plaintiff unknown, but within the knowledge and power of the defendant, the property is alleged to have devolved upon the plaintiff as heir at law, or heir of the body of Sir P. Hungate, or of one or other of the different persons who were successively owners of the Hungate estates. The answer made to this statement is, that in the year 1766, upwards of sixty years prior to the filing of the bill (a period which, in ordinary cases, gives a good title against all the world,) Sir T. Gascoigne was tenant in tail in possession of the Hungate estates; that he suffered a recovery, and acquired a fee simple in them in that year, and that he continued to hold them in fee till the time of his death; that Sir *Thomas was al- [*707] so seised in fee simple in certain other estates which he acquired by purchase, and that being so seised, he effectually devised the whole of his estates, as well as those coming to him through his mother, as those of which he was the first purchaser, upon certain trusts for the benefit of the defendant and his issue; and that, from the death of the testator, in 1809, down till the filing of the bill, a period of all but twenty years, the defendant has been in the undisturbed possession of both classes of estates. The allegations with respect to the plaintiff's title are of the most sweeping kind, and the grounds on which he rests it, very various and contradictory. In substance however, they are all met and traversed by the plea, which stating a seisin in fee tail by Sir T. Gascoigne in 1766, and a subsequent recovery and devise, completely negatives every right which might be supposed to exist in the plaintiff, whether as a remainderman in tail or in fee, under the limitations of a prior devise or settlement made by any of the Hungate family, or as the heir *ex parte materna* or heir general of the person last seised.

The Vice-Chancellor, in overruling the plea, rested his judgment on a charge, "that under or by virtue of some limitation or limitations in the said indentures of lease and release contained, the plaintiff, upon the failure of the issue of the said Sir T. Gascoigne as aforesaid, became, and now is, well entitled to the said manor lands, messuages, tenements, and hereditaments therein comprised and thereby settled and limited, and in particular, that it appears from the said indenture or some recital therein, that the said Sir T. Gascoigne, as the fact was, took thereby, or was otherwise in right duly entitled to an estate for life in the said Hungate estate." His honor conceived that this was collateral *matter, which the plea ought to [*708] have gone on to deny. It is submitted, however, that this was principal matter, to which the plea is a sufficient answer. The very point in issue was, what was the nature of Sir Thomas Gascoigne's estate? If, as the case supposes, it was for life only, no recovery of his could bar the limitations over. But the plea displaces that supposition, by averring that he

was seised in tail, and the averment is perfectly compatible with the allegation, that under the settlement of 1730 he was only tenant for life, since he might well have acquired an estate tail subsequently to that time, and prior to the year 1766. If, for example, the property were limited to Sir T. Gascoigne for life, with remainders to his first and other sons in tail, an ultimate remainder, limited to the heirs of the body of his mother, would have given him an estate tail upon her decease.

The bill is not confined to discovery. It alleges that legal terms are outstanding; and that the plaintiff's title is of a peculiarly equitable nature, and cannot be adequately prosecuted or investigated at law; in addition to a full disclosure, it prays the removal of temporary bars, and that in the event of the plaintiff recovering in the ejectment, possession of the title deeds and the lands may be delivered, and an account be taken of the rents and profits; and it asks for an injunction and receiver in the mean time. Unquestionably, therefore, the suit is for relief; a circumstance which distinguishes it from those cases where, the bill being for discovery and nothing more, the court, in overruling a plea which goes to the denial of the plaintiff's title, has done so expressly on the ground that the effect of allowing the question of title to be litigated and determined in that shape, would be virtually to usurp [*709] the jurisdiction of the court of *law. *Hindman* v. *Taylor*,(a) *Mendizabel* v. *Machado*,(b) *Gait* v. *Osbaldeston*,(c) and *Plunkett* v. *Cavendish*,(d) which, like the present, was a bill for discovery and relief.

The *Solicitor General* (Sir *E Sugden*) and Mr. *O. Anderdon*, for the plaintiff:—In a certain sense this may be called a bill for relief; but the relief is ancillary to the legal remedy, and grows out of it. The account of rents and profits is asked only in the event of the plaintiff succeeding in his ejectment; while the removal of outstanding terms, which has been held to be a species of relief only grantable at the hearing (*Beer* v. *Ward*,)(e) is a preliminary step indispensable to the trial and determination of the question at law. This case, therefore, falls within the rule laid down by Lord Thurlow in *Hindman* v. *Taylor*.(a)

This plea is no answer to the bill. The plaintiff's case is, that he is heir *ex parte materna* of Sir T. Gascoigne, the person last seised, and that either as such heir, or as a remainderman under the limitations of some prior settlement which Sir Thomas had no power to defeat, he became entitled to the estates in question. In support of this case the bill states, that Sir T. Gascoigne was tenant for life of the property, as would appear if a certain deed executed in the year 1730 were discovered and produced; and that he could not, therefore, suffer a valid recovery, so as to enable him to make an effectual devise. The plea contains no denial of the fact of the plaintiff [*710] being heir *ex parte materna*, *or of his being entitled to a remainder in tail or in fee under such a settlement as the bill alleges; but it simply

(a) 2 Bro. C. C. 7. 2 Dick. 651. (b) 1 Sim. 68. (c) 5 Mad. 428; and 1 Russ. 158; on appeal.
(d) V. C. 2d Nov., 1824. See infra, p. 713. (e) Jac. 194.

states, that by virtue of a recovery duly suffered in 1766, Sir T. Gascoigne, being then seised of an estate tail in possession, required a seisin in fee simple and afterwards devised the property to the plaintiff. That, however, is not enough. The plaintiff has a right to know when and by what means his title, at the particular period to which the defendant's attention is pointed, has been displaced; he has a right to know the nature and limitations of the deed of 1730, and in what way its operation has been defeated. A good title as far back as the year 1766, will be no defence, if the plaintiff can establish, as it is the object of his bill to procure evidence for establishing, that the recoverer was at that time seised of a life estate only. For that express purpose the charge, as to the existence and provisions of the deed of 1730, has been introduced; a charge which is collateral to the question of title immediately in issue, but which is, or may be, most material with a view to evidence, and of which the defendant has found it convenient to take no notice whatsoever. If issue were taken upon this plea, the defendant would produce the recovery deed and the devise, while the plaintiff would be left without any means of obtaining the information necessary for the purpose of controverting the plea. It is a settled principle in pleading, that all collateral matter charged by way of evidence, and as conducive to the ground of the relief, must be met and answered; *Evans* v. *Harris*,(*a*) *Holt* v. *Lowe*,(*b*) *Leigh* v. *Leigh*.(*c*)

Mr. *Munro* in reply.

**August* 2.—The Lord Chancellor:—The bill, after stating [*711] that in the year 1654, Sir Philip Hungate was seised in fee of certain property in the county of York, and among the rest of the manor of Sherbone, goes on to deduce a descent from Sir Philip Hungate to Mary Hungate, who appears to have been the heiress at law of Sir Philip, and who married Sir Edward Gascoigne in the year 1730. Of that marriage Sir Thomas Gascoigne was the issue. Sir T. Gascoigne died without children, and, as the bill states, there was no other issue of the marriage of Sir E. Gascoigne and Mary Hungate. The plaintiff next proceeds to set out his own title, deducing his descent from William, who was the second grand son of Sir Philip, and he states himself to be, after the death of Sir Thomas Gascoigne, the heir at law of Sir Philip Hungate, and also the heir at law *ex parte materna* of Sir Thomas Gascoigne. The manner in which he sets out his title to the estates in question is certainly obscure and perplexed; but the result, as it is to be collected from the whole and from some of the averments in the bill, is this, that Sir T. Gascoigne was entitled only to an estate for life, and that after the death of Sir Thomas, the property vested in the plaintiff. In his bill the plaintiff states or refers to a settlement executed in the year 1730, upon or after the marriage of Sir Edward Gascoigne with Mary Hun-

(*a*) 2 V. & B. 361. (*b*) 5 Bro. P. C. 569, Toml. ed. (*c*) 1 Sim. 349.

gate; and he charges that by virtue of that settlement, and from evidence contained in its recitals, it appears, as the fact was, that Sir T. Gascoigne was interested in the property as tenant for life only, and that upon the death of Sir Thomas, the whole interest vested in him, the plaintiff. This deed of 1730, he alleges was duly registered by the clerk of the peace of the county of York, where the lands are situated, but the record of it has since been abstracted from the registry. The deed itself, or some copy, or [*712] *some abstract of it, is, he says, in the possession or power of the defendant, and he prays discovery of its contents in aid of an ejectment which is now depending and was depending at the time of filing the bill; and he also prays that the defendant in that ejectment may be prevented from setting up any outstanding terms, or in the alternative, that the court will be pleased to declare the respective interests of the parties.

To this bill, the defendant, Richard Oliver Gascoigne, has pleaded, that in the year 1766, and before that time, Sir Thomas Gascoigne was seised in fee tail of the property in question; that he afterwards suffered a recovery, the uses of which were declared to himself in fee; and that he devised that property by his will to the present defendant.

The question is as to the validity and sufficiency of the plea. In this plea the defendant states a title inconsistent with and subsequent to that which is set up by the plaintiff — subsequent I mean to the date of the deed of the year 1790, of which a discovery is prayed. He entirely passes over the title of the plaintiff; he passes over all consideration with respect to the deed of 1730; and he in no way attempts to connect his own title with that deed.

Now, I am of opinion, after fully considering the case, that,—the defendant relying upon that subsequent title, not connecting it in any way with the ground of the title upon which the plaintiff stands, not denying that title or any substantial part of it, not denying the possession of the deed of 1730, and not denying its existence,—such a plea cannot be sustained. It was incumbent upon the defendant in some way or other to connect his own [*713] with the plaintiff's title or to traverse *the grounds of that title, or some substantial part of it;—to deny the existence of the deed of 1730; or if he did not do so, to deny at least that the deed was in his possession, and that he had any knowledge of it contents. The plea, therefore, must be overruled.

Plunkett *v.* Cavendish.(*a*)

1824; November 2.

A plaintiff, claiming as heiress at law of L., who had devised real estate to various persons in tail, reserving the ultimate reversion to his own right heirs, alleged by her bill, that the several estates tail had determined by failure of issue,—that no valid recovery had been suffered, or if it had, that the property had been so settled that she was entitled as right heir of L.,—and that so it would appear, if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of such recovery: a plea, which set forth the substance of the deeds making the tenant to the *præcipe*, and leading the uses of the recovery (under which uses the plaintiff had no title,) and of the recovery, was held to be a good defence, though not supported by any answer.

The bill stated that Sir William Lowther, by his will dated in April, 1755, devised certain real estates, in the county of Lancaster, to the Duke of Devonshire and the Marquis of Hartington, and their heirs, to the use of the testator's first and other sons successively in tail male: remainder to the use of Edward Wilson and Thomas Wilson for a term of 200 years, upon certain trusts; remainder to the use of Catherine Lowther for life; remainder to the use of Lord George Cavendish for life; remainder to trustees to preserve contingent limitations, and then to Lord George's first and every other son successively in tail male; in default of such issue, to the use of Lord Frederick Cavendish for life; with remainder to trustees to preserve contingent limitations, and then to Lord Frederick's first and other sons successively in tail male; in default of such issue, to the use of Lord John Cavendish, and the heirs male of his body; and in default of such issue, to the testator's own right heirs:—
that the testator died in 1756, leaving no *issue:—that in 1764, [*714]
Catherine Lowther died:—that Lord George Cavendish died in 1794,
Lord John Cavendish, in 1795, and Lord Frederick Cavendish, in 1803, all of them without issue:—that Lord John Cavendish made a will, by which he devised, among other things, all his estates in the counties of York, Northampton, and Lancaster, to such uses as Lord Frederick should appoint, and in default of appointment, to Lord Frederick for life, with remainder to Lord George Henry Cavendish in fee:—and that, upon the death of Lord F. Cavendish in 1803, the ultimate remainder to Sir William Lowther's right heirs took effect; but Lord George Henry Cavendish entered into, and had remained in possession of the estates under the will of Lord John Cavendish. After deducing the pedigree of the plaintiff as heiress of Sir William Lowther, and stating that, as the term of 200 years, though the trusts of it were satisfied, was still subsisting, she could not assert her claim at law, the bill contained the following allegation:—"And the said Lord George Henry Cavendish pretends that some recovery was suffered by the said Lord John Cavendish as tenant in tail in remainder under the will of the said testator, Sir William Lowther; and that some deed was executed to lead or to declare the uses of

(*a*) This is the case referred to at page 709.

the said recovery; and that the said Lord John Cavendish, by virtue of the said recovery, and of the deed leading to the uses thereof, became entitled unto the said estates as tenant in fee simple in remainder; and that, under or by virtue of the aforesaid will of the said Lord John Cavendish, the said defendant, Lord George Henry Cavendish, became absolutely entitled to the said estates as tenant in fee simple; the contrary, whereof the plaintiff charges to be true, and that no good or valid recovery was ever suffered of the said estates: and if it were, that the estates were so settled, that, in the events which have happened, the plaintiff, as the right heir of the said Sir
[715] William Lowther, is entitled thereto; *and it would so appear, if the said Lord George Henry Cavendish would set forth when and in what courts or court such recoveries or recovery of the said estates respectively were suffered, and who were the parties thereto respectively, and by whom the deeds creating the tenants or tenant to the *præcipe* were respectively executed, and who were the parties to the deeds or deed leading or declaring the uses of such recoveries or recovery respectively, and would produce all such deeds; all of which the plaintiff charges, if they exist at all, are now in possession of the said defendant, Lord George Henry Cavendish." The prayer was, that Lord George Henry Cavendish might be decreed to deliver up possession of the lands, and to account for the rents and profits; and that the defendants might be restrained from setting up the outstanding term in bar to any proceeding which the plaintiff might take at law.

To this bill Lord George Henry Cavendish pleaded, that, Lord George Cavendish being so seised (as tenant for life) and in possession of the said premises, and the said Lord John Cavendish being so entitled thereto for an estate in tail male in remainder, "certain indentures of lease and release, bearing date respectively the 28th and 29th of January, 1766, were duly made and executed; that is to say, the indentures of lease bore date the 28th of January, 1766, and was made and executed by and between the said Lord George Cavendish and Lord John Cavendish of the one part, and William Shaw of the other part; and the said indenture of release bore date the 29th of January, 1766, and was made and executed by and between the said Lord George Cavendish and Lord John Cavendish of the first part, William Shaw of the second part, and John Heaton of the third part, whereby Lord George Cavendish and Lord John Cavendish did grant, bargain, sell, and
[*716] release unto William Shaw, all and every *the manors, messuages, farms, lands, tenements, rents, and other hereditaments whatsoever of the said Sir William Lowther, or whereof or wherein he or any person or persons, in trust for him or to his use, had any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, &c., situate in the county of Lancaster, with their appurtenances, to hold the same unto the said William Shaw and his assigns for the joint lives of the said Lord George Cavendish and William Shaw, to the intent that the said William Shaw might be tenant of the freehold of the said premises, in order that one or more

common recovery or recoveries might be suffered thereof, &c, and it was thereby declared that the said common recovery or recoveries should enure to the intent and purpose, to corroborate and confirm the term of 200 years limited by the said will of Sir William Lowther; and after the determination thereof, to corroborate, strengthen, and confirm the estate, which, by the said will, stood limited to the said Lord George Cavendish for his life; with remainder, to corroborate the estate limited by the will, to trustees to preserve contingent remainders; with remainder, to corroborate the estates limited by the said will to the first and other sons of Lord George Cavendish successively in tail male; with remainder, to corroborate the estate limited by the said will to the said Lord Frederick Cavendish and his assigns for his life; with remainder, to corroborate the estate limited by the said will to trustees to preserve contingent remainders; with remainder, to corroborate the estates limited by the said will to the first and other sons of Lord Frederick Cavendish successively in tail male; with remainder to the use of Lord John Cavendish, and the heirs male of his body; with remainder to the use of the survivor of Lord George Cavendish, Lord Frederick Cavendish, and Lord John Cavendish, his heirs and assigns for ever:—that, at the Lancaster session of *assizes, holden on Saturday, the 29th day of March, in the sixth year of George the Third, a common recovery was accordingly duly had and suffered of the said premises, in the duchy court of Lancaster, to the several uses declared in and by the said indenture of release herein before set forth, in which recovery the said John Heaton was demandant, the said William Shaw tenant, and the said Lord John Cavendish vouchee, who duly vouched over the common vouchee:—that Lord Frederick Cavendish survived Lord George Augustus Cavendish and Lord John Cavendish, and thereupon, under and by virtue of the said indentures of lease and release, and the recovery suffered in pursuance thereof as aforesaid, became and was seised of the said premises to him and his heirs for an estate of inheritance in fee simple, and so continued until the time of his death:—that the said Lord Frederick Cavendish departed this life in the year 1803:—and that thereupon this defendant, under and by virtue of a title duly derived from the said Lord Frederick Cavendish, entered into possession of the said premises, or into the receipt of the rents and profits thereof." [*717]

Mr. *Horne* and Mr. *Munro*, for the plea.

Mr. *Sugden* and Mr. *Pemberton*, for the bill:—The bill alleges that no valid recovery was suffered, or if any recovery were suffered, that the estate was so settled, that in the events which have happened, the title is in the plaintiff, and that so it would appear, if the plaintiff would produce all such deeds as are therein mentioned. These charges ought to have been met by an answer. How can a plea of a recovery be a complete answer to a case, which proceeds upon matter *dehors* the recovery? Every averment in the plea may *be true; and yet the estate may have been so settled, as to vest the title in the plaintiff. [*718]

Mr. *Horne* in reply.

THE VICE-CHANCELLOR(*a*) stated, that the only question was, whether the present case came within the rule, that where there are collateral allegations in the bill sufficient to avoid the effect of the matter relied upon as a defence by way of plea, those allegations must be denied by answer, in order to make the plea an effectual defence; that here the charge in the bill was, that, if any recovery were suffered, the estate was so settled that the plaintiff was entitled as the right heir of Sir William Lowther; that the plea was a direct denial of that averment, for it set forth the uses of the recovery, and under those uses there could be no such title as was alleged in the bill; and that it was, therefore, evident that the matter charged in the bill, to which the plaintiff argued an answer should have been given, was not collateral to the matter pleaded.

For these reasons his honor allowed the plea.[1]

[*719] SIMOND *v.* HIBBERT.

1830; January 25, 26; August 3.

Lien established against the produce of West India estates in respect of supplies furnished to the estates upon an agreement implied from the course of dealing and conduct of the parties.

IN the year 1794, John Tharp, Esq., was the owner of considerable estates and plantations in the island of Jamaica. In the month of December, in that year, Alexander Campbell a nephew of Mr. Tharp, then residing with him upon one of his estates in Jamaica, communicated to his uncle in conversation, his intention of connecting himself in business with some house of agency at New York, and he begged to know how far he might expect Mr. Tharp's assistance and support, should such a connection take place. In reply, Mr. Tharp assured him that, in the event of his forming the connection contemplated, he (Mr. Tharp) would send an order to that house for all the supplies wanted for his estates in Jamaica, and would consign to it in return a sufficient quantity of rum, the produce of the estates, to pay for the supplies, and would allow upon the sales the usual mercantile commission. In consequence of that conversation Campbell went to New York, and, in the month of April, 1795, was admitted a partner in the house of Simond & Company. Accordingly, acting upon that understanding, Simond & Co. from time to time made shipments of lumber and provisions for the use of Mr. Tharp's estates, and received consignments of rum for sale on account of Mr. Tharp, and in payment of their shipments. This course of dealing went

(*a*) Sir John Leach

[1] Vide *Denys* v. *Locock*, 3 Myl. & Cr. 231. *Foley* v. *Hill*, id. 476. *Harpending* v. *The Dutch Church*, 16 Peters, 487. *Bogardus* v. *Trinity Church*, 4 Paige, 178. *Chadwick* v. *Broadwood*, 3 Beav. 530. *Thring* v. *Edgar*, 2 Sim. & Stu. 574. *Everitt* v. *Watts*, 3 Edw. Ch. Rep. 486. *Hardman* v. *Ellames*, 5 Sim. 640. *Crouch* v. *Hickin*, 1 Keen, 391, n. 1.

on during the short time Mr. Tharp remained in Jamaica, and was distinctly recognized as a permanent arrangement in several letters written by him to Simond & Co.; and after he quitted the island it was continued as long as he lived, with his sanction, by his attorney, Mr. Green, who was the manager of his West India estates.

*By his will Mr. Tharp devised his estates to certain trustees, of [*720] whom Green and another lived in Jamaica, and the rest were resident in England, upon trust to manage and cultivate the same to the best advantage, and after payment of all charges and expenses, to apply the profits and produce thereof in manner therein mentioned, till the testator's grandson, then an infant of tender years, should attain the age of twenty-four. And he further directed that, in order to relieve his trustees from the trouble and responsibility of keeping long and voluminous accounts, an amicable suit should be instituted in Jamaica, for the purpose of annually passing the accounts of the persons who were employed in managing the estates. Upon Mr. Tharp's death which happened in 1805, Mr. Green with the approbation of the other trustees, entered into the possession and management of the plantations, and carried on the cultivation of them agreeable to the trusts of the will. Under his management, exactly the same course of dealing continued between him and Simond & Co., which had existed in the testator's lifetime; shipments of lumber and provisions being made for the use of the Jamaica estates, on the one hand, and consignments of rum in payment of them being sent to New York, on the other. The invoices, accounts of sales, and accounts current transmitted by the New York house to the manager in Jamaica, relative to these transactions, were uniformly headed, "On the account and risk of and in account with the estate of J. Tharp, Esq., deceased;" while certain other transactions, which took place during the same period between that house and Green in his private capacity, were, in their books, kept distinct from the former, and were charged to Green's individual account only.

Under the decree made in the amicable suit, instituted in the name of the infant *cestui que trust* against the *trustees, the accounts [*721] between Green and the estate were annually examined and passed; and in those accounts Green claimed and was allowed payments on account of a considerable portion though not the whole of the shipments made by the plaintiff's house for the use of the estate. The accounts between Simond & Co. and the estate were balanced and settled down to the year 1808, but the dealings continued till the end of the year 1811, at which time a considerable balance was due to Simond & Co. Green shortly afterwards died insolvent; and the war then breaking out between this country and the United States, Simond & Co., who were alien enemies, were unable to prosecute their claim in the English courts against the trustees at home.

The present bill was subsequently filed by the plaintiff, as the surviving

representative of the house of Simond & Co., against the trustees in England for the purpose of establishing a lien upon the produce of the estate, which had been consigned to this country and sold, and the proceeds paid into court, in a suit for administering the trusts of the will. The prayer was, that an account might be taken of the plaintiff's debt, and that the amount found due might be paid out of the fund in court upon which the lien was claimed.

By the order made at the original hearing the master was directed to inquire and state whether, in respect of the supplies furnished by the plaintiff's house for the use of the estate, for which credit had been allowed in the accounts between the estate and the late William Green, the plaintiff was entitled to claim payment from the estate; and also whether, in respect of such supplies furnished during the life of Green, for which no credit had been [*722] allowed to Green in those accounts, the plaintiff *was in like manner entitled to claim payment from the estate. The master having found that the estate was still liable to the plaintiff in respect of both descriptions of supplies, the trustees excepted generally to his report; and the exception having been overruled by the Vice-Chancellor, Sir J. Leach, they now appealed from that decision.

Mr. *Horne*, Mr. *Pepys*, and Mr. *S. Cullen*, for the plaintiff, admitted that the doctrine of implied lien for stores furnished to West India estates had been considerably narrowed by the decision in *Scott* v. *Nesbitt*;(*a*) but they relied in this particular case upon the nature of the contract, explained and confirmed as it had been by the long course of subsequent dealings between the parties. Those dealings, commencing in Mr. Tharp's lifetime, and continued upon precisely the same footing after his death, were carried on by the plaintiff's house, solely on the faith of a credit given to the estate. Neither the trustees as a body, nor the manager Mr. Green, were separately or personally debited. The supplies were uniformly entered and charged in the invoices and accounts as advances made to the estate itself, and upon the security of its returns. If the trustees had done their duty, and investigated the accounts of their representative Green, who was himself one of their number, they must have discovered how the fact stood; and Simond & Co., were not to suffer, because these gentlemen had allowed themselves to be duped by the knavery of their agent in Jamaica. The report found that considerable shipments of lumber and provisions, of which the estates had reaped the benefit, still remained unpaid; and that a large balance in respect of them was due to the plaintiff. The fund in [*723] court consisted in part of the proceeds of consignments *of rum, produced by means of those very shipments; without which, indeed, the cultivation of the estate could not have been carried on; and it was only equitable, that that fund should be held liable for the balance. A West India plantation resembled a manufactory or a mining concern, upon the stock and

(*a*) 14 Ves. 438.

produce of which the parties furnishing the supplies necessary for working it, might either by usage or agreement retain a lien for their reimbursement. The settlement of accounts between Green and the trustees, under the decree of the court of chancery in Jamaica, and in which the former had been allowed credit for payments in respect of the supplies in question, although, in point of fact, he had never paid for them, could not prejudice the rights of the plaintiff's firm, which was no party to the suit, and had no notice either actual or constructive, of the proceedings: still less could such a settlement affect that portion of the demand, for which Green had not sought to make the estate his debtor, and which had never been included in his accounts. The circumstance that, in his private transactions with the house at New York, Green was separately charged as a personal debtor only, was strong evidence to show that the other dealings proceeded throughout upon a common understanding, that they were all carried on not upon the credit of the trustees, but the security of the estate itself. If a merchant, upon the faith of the consignments being sent to him, shipped stores to a West India plantation, and the owner, notwithstanding, chose rather to remit them to another, the court would interfere by injunction; *Banbury* v. *Winter*.(*a*) The contract here was to send so much rum as would be sufficient to cover the value of the shipments, and not a *specific value; but that could [*724] not vary the principle, though it might render its application less easy.

The *Solicitor General*, Mr. *Pemberton*, and Mr. *Rolfe*, contra:—It is admitted that no peculiar usage exists in the West Indies, which of itself creates a lien upon these estates or their produce; and that no charge in favor of the claim has been imposed by the testator's will; but reliance is placed upon an implied agreement, and upon the course of dealing. There is no evidence, however, of agreement with the trustees either express or implied; and if there were, the agreement would be *ultra vires* of the trustees, and therefore, inoperative. Green, by the will, had no power to mortgage, even for the working of the estate; of course he could not effect the same thing indirectly by creating an equitable lien on the property. This court recognizes no such lien, unless in the single instance of the vendor of an estate before he receives his purchase money. Even if Green had been competent to bind the estate and his co-trustees, by acts which go beyond the objects of the trust, still there is no evidence of any contract on his part; and, if it had been otherwise, his contract could only affect the testator's assets to the extent to which, as trustee and manager under Mr. Tharp's will, he was authorized to incur expenditure in the cultivation and improvement of the estates, on behalf of the persons beneficially interested; *Ex parte Garland*.(*b*) After Mr. Tharp's death, the dealings, whatever were their nature, were carried on with Green alone in his individual character, and were not communicated to the trustees in England. A creditor cannot

(*a*) 1 J. & W. 255. (*b*) 10 Ves. 110.

be allowed, for the purpose of bettering his security, to pass by his [*725] principal debtor and to establish his *demand upon a fund to which that debtor may, as a trustee, be himself entitled to resort for his own reimbursement; *Worrall* v. *Harford.*(*a*) The notion of a lien upon future crops, to secure the payment of shipments of stores previously made, is quite new, and extremely dangerous in principle.. As well might it be alleged that a slopseller in town, who contracts to furnish clothing to the laborers of a farmer in the country, could acquire by the course of dealing an equitable lien upon the crops or the cattle produced upon the farm, and sent for sale to the London markets. In the present case the accounts between the trustees and their agent have been long since settled, and a part of the supplies for which payment is now sought has been already paid for, out of the funds in their hands; to that extent at lest the estate, having once borne its burden, must now be held to be discharged; *Anon.*(*b*)

August 3.—The Lord Chancellor:—When this question came originally before the court, it was apparently of a very complicated nature, and a reference was therefore directed to the master, by which the facts have been disentangled, and it now appears to be an extremely plain case.

In the year 1795, Mr. Tharp, the owner of estates in the island of Jamaica, had a nephew of the name of Campbell, who was desirous of entering into partnership with the firm of Simond & Co. at New York, of [*726] which *firm the plaintiff Simond is the surviving representative; and it was then agreed by Mr. Tharp, that if the proposed partnership should be carried into effect, his estates in Jamaica should be supplied with provisions and lumber by the house at New York, and that he in return should pay for those supplies by shipments of rum to be sent from his estates, consigned to the New York house. Certain stipulations were also made with respect to freight and commission. The partnership took effect, and the agreement was acted upon accordingly.

This arrangement was entered into in 1795, and Mr. Tharp soon afterwards left Jamaica, and came to England, where he resided till his death in 1805. During the whole of the intermediate period, his estates were managed by a person of the name of Green; and, under Mr. Green's management, the transactions with the house at New York continued to be conducted upon the footing of the original arrangement. Mr. Tharp, by his will, devised his West India estates to trustees for the benefit of his infant grand son. Two of the trustees who acted in the trust resided in Jamaica, and two others who also acted, and of whom the defendant Hibbert was one, were resident in England. William Green, who superintended the West

(*a*) 8 Ves. 4.

(*b*) Salk. 153. *Juxon* v. *Brian*, P. Ch. 143. *Hutchinson* v. *Mascareen*, 2 B. & B. 49. *Oldfield* v. *Oldfield*, 1 Vern. 336. *Harrison* v. *Cage*, 2 Vern. 85, and n. 1 P. Wms. 518. 2 Ves. sen. 603. 5 Ves. 736.

India estates, was appointed of one those trustees, and he remained in the management of the estates long after the decease of Mr. Tharp. Subsequently to Mr. Tharp's death, the dealings with the house of Simond & Co. were carried on upon the same footing as they had been during his lifetime. The accounts rendered by Simond & Co. were entitled in this way, "on the risk and account of the estate of the late J. Tharp, Esq." Mr. Green, besides had separate transactions with the house, in which he was debited in the ordinary way, being personally charged as a debtor to Simond & Co.

*This was the mode in which the business continued to be conduct- [*727]
ed. Supplies were furnished till the year 1811, and the accounts were made up to the month of December, in that year; the shipments of provisions and lumber being entered on the one side of the account, and the consignments of rum on the other. At that period the war broke out between this country and the United States of America, and a considerable balance on the foot of this account, was then due to Simond & Co. About the year 1816 or 1817 this suit was instituted to recover that balance, and praying that the debt, when ascertained, might be paid out of the proceeds of the consignments, or, what amounted to the same thing, out of the funds in court.

When the cause came on, a reference was directed to the master to make two inquiries: first, whether the estate was liable in respect of shipments of lumber and provisions, where no credit had been given for them in the accounts between Mr. Green and the estates; and, secondly whether the estate was so liable, where such credit had been taken. The master has found that the estate is liable in both respects,—in respect both of the lumber and provisions, for which credit had been taken, and of those for which credit had not been taken, in the accounts between Mr. Green and the trustees. To this report the defendant has excepted generally and the exception comes on with the further directions. The main question, however, is on the exception; and it appears to me that this turns entirely on the nature of the contract, and of the credit given between the parties. In the first instance, the agreement was, that the lumber and provisions should be supplied by the house at New York, and that the shipments should be paid for by the rum—the produce of the specific estates. After Mr. Tharp's death, the transactions were carried on upon *the same foot- [*728]
ing. Mr. Green was not personally debited, but the consignments were made on the account and at the risk of the estates: the accounts were headed in the same way; they were "Louis Simond & Co. in account with the estates of John Tharp, Esq.," and all the circumstances lead me to believe that it never was intended that a personal credit should be given to Green or the other trustees; but that they and all parties looked to the estates; and that it was a credit given to them in respect of the estates. It appears to me, therefore, that the conclusion at which the master has arrived was perfectly correct, and that no distinction can be made in this respect between the one account and the other; for, whatever settlement was made be-

tween Mr. Green and the trustees, or Mr. Green and the estates, that cannot affect the rights of Simond & Co. who were not parties or privy to any such settlement.

Upon these grounds, I am of opinion with the master, that the estate was liable to pay the balance due, and that the trustees are consequently bound to pay it out of the proceeds in their hands, or, what comes to the same thing, out of the money now in court. The exception must, therefore, be overruled.

[*729] *THOMAS *v.* MONTGOMERY.

1829; December. 1830; January, August 5.

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish.

If in a suit to administer a testator's assets, it clearly appears that a surplus will remain after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the court will by anticipation direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.

Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees.

THE late Duke of Queensbury died in the month of December, 1810, possessed of a very large personal estate, which consisted principally of money in the public funds. By his will he bequeathed pecuniary legacies and annuities to a great number of persons, and he gave the residue of his estate and effects to be equally divided between two of the children of the present Marchioness of Hertford. Shortly after his decease, a bill was filed by some of the pecuniary legatees against the executors, for the administration of his personal estate, and, in May, 1811, a decree directing the usual accounts was pronounced in that suit.

Upon going into the master's office it was discovered, that although the English debts of the testator, when compared with his assets, were extremely inconsiderable, and might be paid off without delay; yet in order to have the fund clear, so as to be distributable among the legatees, it would be necessary to await the result of certain legal proceedings then pending in the Scotch courts. These were proceedings instituted by persons interested as remaindermen in the entailed estates of the Duke of Queensbury in Scotland, for the purpose of setting aside a great number of leases granted by the Duke in contravention, as it was alleged, of his powers under the entail; and as the tenants [*730] who had purchased, *and who held under the leases in question, would, in case of eviction, have claims for compensation to a large amount against the Duke's personal estate, and, as the adjustment of those claims themselves could only be effected after a long course of litigation, it became

obvious that the distribution of the assets among the legatees must be postponed to an indefinite and probably a remote period.

Under these circumstances, the particular legatees, in the month of June, 1814, presented a petition to Lord Eldon, wherein they submitted, that in consideration of the peculiarity of the case and the magnitude of the fund in court, the legacies and annuities ought to be set apart separately in stock, subject to the claims against the estate, so that the legatees might get their legacies and the interest due upon them, in stock at its then price, and have the benefit of further accumulations: they therefore prayed that so much of the fund in court as would be sufficient to answer the legacies, and interest, and arrears of annuities, might be set apart and apportioned among the legatees and annuitants, subject nevertheless to the claims mentioned in the master's report, as being then depending in Scotland.

Upon this petition, his Lordship ordered that the master should proceed upon the inquiries directed by the previous orders, and that the rest of the petition should stand over.

Various other proceedings were afterwards had in the cause. The suits upon which the extent and validity of the debts in Scotland depended, were brought to adjudication in the court of session, or by appeal in the house of lords, and were finally determined. The amount of the debts themselves was gradually *ascertained, and many of them were paid off [*731] or abandoned. And as it became evident that the surplus, after satisfying all the remaining claims, supposing these to be established in full, would still be considerable, though their exact amount could not be known with certainty, payments on account were from time to time made to the particular legatees without prejudice to the question of appropriation raised by their previous petition, until in the end, the whole of what remained due to them in respect of their legacies, both for principal and interest, was discharged. The general nature of the proceedings, and the mode in which the successive payments to the legatees were directed to be applied, are clearly stated in the judgment of the Lord Chancellor.

In the month of August, 1829, the master reported, that after providing amply for all the contingent claims which were then outstanding, there would still remain in court an available balance of nearly 350,000*l.* 3 per cent. bank annuities. The residuary legatees thereupon petitioned, that a portion of this balance might be transferred to them, leaving, however, a sufficient fund to satisfy the utmost possible amount of the unliquidated claims. The particular legatees at the same time presented a counter petition, praying that such transfer might be stayed; that the question of appropriation which had stood over since June, 1814, might be again taken into consideration; that the master might ascertain the amount of the several legacies, and the arrears of the annuities as they from time to time accrued due, and might take an account of the dividends which from time to time accrued due on so much of the capital stock standing to the credit of the cause, as was applicable to pay and satisfy such legacies and arrears of annuities, and of the accumulation

[*732] thereof, in such manner as if the same had been set apart and *appropriated, and allowed to accumulate for their benefit; that the petitioners might, in addition to the principal of their legacies and interest at 4 per cent., and the arrears of the annuities, receive their respective proportions of the said interest, dividends, and accumulations; that the sum reported to be a clear fund, after providing for the claims then unsettled, might be applied towards payment of what should be found due to the petitioners on such account, and that the deficiency, if any, should be made good out of the reserved fund, in the event of its proving more than sufficient to satisfy the outstanding demands, and that with that view, and subject to that charge, an appropriation and apportionment of the reserved fund might be made for the benefit of the particular legatees.

The two petitions were brought on together, when the question which they raised was elaborately argued before the Lord Chancellor.

Mr. *Pepys*, Mr. *Bickersteth*, Mr *Rose*, Mr. *Roupell*, and Mr. *Boteler*, for the particular legatees contended, at great length, in favor af the appropriation, on the ground of its expediency and justice; they also relied on certain expressions, which fell from Lord Eldon, when the application was originally discussed before his Lordship. The only case cited was *The King* v. *Mainwaring*,(*a*) in the exchequer.

The *Solicitor General*, Mr. *Horne*, Mr. *Treslove*, Mr. *Knight*, and Mr. *Lynch*, for the residuary legatees, opposed the application.

[*733] *August* 5.—The Lord Chancellor:—This is a question with respect to the appropriation of a fund under the will of the late Duke of Queensberry. The testator died in the month of December, 1810; and his English debts amounted to a very inconsiderable sum, to between 8000*l.* and 9000*l.* only. The legacies given by his will amounted to between 600,000*l.* and 700,000*l.*, and the funds, in personal property, as far as it is necessary to consider it, amounted to upwards of 1,300,000*l.* in the three per cents. If this had been the whole state of the personal property, of course the affairs of the estate might have been immediately wound up. But there were certain claims upon the fund, arising out of leases which the Duke of Queensberry had granted of his Scotch estates,—claims for compensation preferred by the Duke of Buccleuch and the Earl of Wemyss, as well as by the tenants of the estates. The leases, it was supposed, had been granted in contravention of the powers of the Duke of Queensberry; and until those claims were settled, the amount of the funds that would be eventually applicable to the payment of the particular legatees, was, of course, uncertain.

In the month of June, 1814, a petition was presented to the late Lord Chancellor, Lord Eldon, on the part of the particular legatees, the prayer of which was, that an estimate might be taken of the sums that were at that time

(*a*) 2 Price, 67, and, under the name of *Wall* v. *Attorney General*, 11 Price, 643.

due to the particular legatees, for principal and interest; that an apportionment might be made of the funds, and that the sums then estimated to belong to the several particular legatees might be carried over to their separate accounts, subject always to the eventual liabilities arising out of the proceedings then depending in Scotland. When that petition came on to be heard in the year 1814, Lord Eldon refused, or rather declined to *make [*734] any order upon it; and the application was never renewed during the time his Lordship was in office.

It was, however, suggested at the bar, and it appeared also from the papers, that when the application came on, the Lord Chancellor stated that he considered the claim to be just. Whether or not such an expression did fall from his Lordship, I have now no means of ascertaining with accuracy. Some time afterwards, I think in the year 1817, in consequence of a reference to the master, it was ascertained, that the amount of the Scotch claims I have adverted to would not exceed the sum of 565,573*l.* It was obvious, therefore, that there would be a very large surplus. This favorable situation of the funds encouraged the legatees to make a special application to Lord Eldon; and the result of their application was a declaration of his Lordship's opinion, that he might, with safety to all parties, and without endangering the Scotch claims, direct one-fourth of the amount of the legacies to be paid, calculating interest upon them up to that time; and an order was accordingly made to that effect.

Afterwards, in the year 1823, a report was made by the master that, after satisfying the Scotch claims, in case they should be eventually established, there would still be a clear fund, amounting to between 400,000*l.* and 500,000*l.*, applicable to the claims of the legatees. In consequence of this report, an order was made for the division of that sum among the legatees; and the distribution was directed to proceed upon this principle: it was considered that the former payment should be applied, in the first instance, in satisfaction of the interest, as it existed at that time; that the surplus should be appropriated to the discharge of so much of the principal as it would satisfy;[1] that interest should next be *calculated upon the [*735] remainder of the principal; and that the sum which was now to be applied should be appropriated to the payment of the new interest accrued on the undischarged principal, and any surplus that might remain was then to be applied in liquidation of so much of the principal as that surplus would be equal to satisfy.(*a*)

In April, 1827, the master, in like manner, again reported that there was a clear sum of 360,000*l.* applicable to the payment of the legatees. And an order was thereupon made by the Vice-Chancellor, in the month of June in

(*a*) This mode of applying the payments made to the pecuniary legatees on account of their legacies was afterwards brought into discussion upon exceptions to the master's report, when its propriety was confirmed by the judgment of the Vice-Chancellor. 2 Sim. 348.

[1] Vide *Campbell* v. *Groham*, ante, 453, 465, and note ibid

that year, directing a second division of that fund to be carried into effect upon similar principles with the former.

In the month of January, 1828, another report was made by the master, stating that there was a clear fund of 226,000*l.* applicable to the payment of the balance due to the pecuniary legatees. The balance then due for principal and interest did not amount to that sum, and the court ordered so much of the fund to be distributed, according to the principles already explained, as would be equal to the discharge of the balance. The result, therefore, of the process has been this:—as soon as the court ascertained that there was a surplus which might with perfect security be resorted to, that surplus was directed to be applied in discharge of the existing interest, and what remained, after the discharge of the existing interest, was applied in discharge of the principal; and in this way successive payments were made, when-
[*736] ever *the court found it could be done with safety, until the whole of the legacies, with interest, were paid off and satisfied.

By the last report which the master has made, it appears that there is in court a clear fund of 343,870*l.* bank annuities belonging to the estate of the testator. This fund is claimed by the residuary legatees. On the other hand, the particular legatees lay claim either to the whole, or to a part of it, according to the result of the calculation which they contend ought to be made. They maintain, that although no order was made on the petition of June, 1814, the question was reserved by the subsequent orders; because, whenever the successive apportionments of the fund were authorized, these were expressly directed to be made without prejudice to the question of appropriation. The terms of the orders are not very precise in that respect; but still there is in most of them a reservation, that the payments shall be considered as being made without prejudice to any question existing in the cause. The particular legatees, therefore, contend that they are now entitled to agitate the same question as they intended to agitate by their petition of June, 1814. And they say that their claim ought to be considered now as if the appropriations of the stock, taking it at the market price of the day, had been then actually made, and the amount carried over to their separate account, according to the prayer of their petition; that a calculation should be made of the accumulations thereupon, and the aggregate sum be computed upon that principle; that the estate should, on the other hand, have credit for the payments they have received, and that they, the particular legatees, should be paid the balance; and the single question is, whether upon that ground they can have a right to any portion of this, the residuary fund.

[*737] *Now according to the ordinary practice in administering the assets of a deceased testator, the court, in the first place, waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid. They are paid their principal, and if entitled to interest, they are paid interest at the rate of four per cent. up to that time.

In this particular instance, on account of the fund being so large with reference to the claims to which it was subject, the court anticipated the payment to the legatees; it allowed them from time to time to receive their interest whenever that could be paid with safety; and it allowed them to receive, from time to time, so much of the principal as could be paid before the claims were finally settled and wound up. In fact, therefore, before the claims were finally settled and wound up, they have received the whole amount to which they would be entitled, according to the ordinary rules of the court. The question is, whether, in the peculiar circumstances of this case, the court will depart from its ordinary rules, for the purpose of granting them that which they pray by their present petition.

Lord Eldon refused to make any order upon their petition in 1814. He continued in office for twelve years afterwards, and no attempt was ever made to renew the application. It appears to me that the consequence of acceding to the application would be, that the court would establish a new principle, and one which, unless it was laid down as a universal rule, would be productive of this inconvenience and injustice;—it would be to give an election to a particular legatee. The particular legatee, if the public funds happened to be very low, would apply to have an appropriation; because in that case he would receive more than the *interest which the court [*738] allows. If, for example, the three per cents. were at 50*l.*, instead of receiving four cent. he would, by the effect of such an appropriation, receive six per cent. upon his legacy. And he would also have the benefit of the chance of a rise in the funds. In that state of the public securities, therefore, he would naturally make an application. If, on the other hand, the funds were extremely high, as if the three per cents. were between 90*l.* and 100*l.* and it was likely that the affairs of the testator would be wound up within a moderate time, he would hold back, and allow matters to take their usual course, because it would be more beneficial, in that state of the funds, to take the interest according to the ordinary rules of the court, at four per cent. In the one case he would make an application to the court, because it would be beneficial to him and disadvantageous to the residuary legatee; in the other he would decline to make it, because it would be disadvantageous to him and for the benefit of the residuary legatee.

It appears to me, therefore, that to accede in a particular instance to the prayer of a petition like the present would be unjust; because it would be to give a right of election to a party who is not entitled to elect. It would be to give him an election to prefer his petition to the court, and to give him that benefit at the expense of the residuary legatee. The question, then, appears to resolve itself into this,—Ought we to establish that as a general rule? Is it a better rule than the one which the court, has hitherto followed? I think it is not; for, according to the rule which the court has adopted, the party ultimately receives the amount of his legacy, with interest at four per cent.; and all contingencies are left to fall on the residuary

legatee — contingencies disadvantageous to him in some cases, and favorable to him in others. The court, in establishing this as a [*739] *general regulation for its guidance, has deemed it better to give a fixed sum to the pecuniary legatees, with a certain rate of interest, throwing all the contingencies on the residuary legatee, than to adopt the opposite course. That, in my opinion, is the best rule. I see no ground to deviate from it in the present instance. And the fund in dispute must, therefore, be considered as belonging to the residuary legatees.[1]

JEFFRAY *v.* M'CABE.

1830; August 12, 18.

If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence.

***Semble*, it is too late to except to an answer for impertinence, when the time has expired, after which according to the new orders, the answer is to be deemed sufficient.**

IN this case exceptions for insufficiency to the defendant's answer and, subsequently, to his further answer, were allowed. On the second allowance of the exceptions, the plaintiff obtained an order to amend his bill, and that the amendments and exceptions might be answered together. On the 10th of February, 1830, the defendant put in his answer to the amended bill, and his second farther answer to the original bill. On the 25th of February exceptions were taken to that answer for impertinence: on the 8th of March, it was reported impertinent, and an order to expunge the impertinent matter was obtained on the 12th of the same month, but the plaintiff did not get the impertinence expunged till the 3d of May following. On the 15th of May an order was made upon a petition as of course at the rolls, referring back the answer for insufficiency on the old exceptions.

Sir *Edward Sugden* and Mr. *Lynch* now moved that the order made at the rolls might be discharged for irregularity. By the sixth of the new orders, which they contended was imperative, no second reference [*740] for insufficiency *upon the old exceptions was to be allowed, unless made within a fortnight after the filing of the further answer. The insufficiency and the impertinence of an answer were distinct questions, and there was no reason why exceptions on the former ground might not be filed pending a reference of exceptions on the latter. Even the reference for impertinence was not obtained till after the fortnight had elapsed. The opportunity for referring the further answer upon the old exceptions was therefore gone;

[1] In a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate* v. *Field*, 2 Hare, 211.

and if a successful reference for impertinence were permitted to revive it, the object of the sixth order would be entirely defeated.

Mr. *Pepys*, contra, insisted that till the 3d of May, when the impertinence was expunged, there was in fact no answer on the file. According to the old practice, a reference could not be had for insufficiency pending a reference for impertinence; *Dyer* v. *Dyer*;(*a*) and the sixth order did not attempt to introduce any alteration in that respect. From *Kinworthy* v. *Allen*,(*b*) it was clear, that the period within which a reference for impertinence might be made was not limited; and till the result of such a reference was known, it was impossible to say whether there was an answer or not, or of what it consisted; nor was the rule at all varied by the eleventh of the new orders.

August 18.—The Lord Chancellor:—The order obtained at the rolls on the 15th of May last must be discharged for irregularity, with costs. After the expiration of the fourteen days, it was too late for the [*741] plaintiff to object to the answer for impertinence, as at the expiration of that time the answer is, by the terms of the sixth order, to be deemed sufficient.[1]

Osbourn *v.* Fallows

1830; August 13, 18.

To a bill for the redemption of a mortgage term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mortgagee's will, are necessary parties; although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers.

The plaintiff's grand father having conveyed certain messuages of which he was seised in fee to one Cotterell for a long term of years, to secure the re-paymeut of 100*l.* with interest, the term was afterwards assigned, in 1762, to Joseph Fallows, who at the same time made a further advance of 60*l.*, on the security of the mortgage, and under an arrangement with the mortgagor, was let into possession. The interest of Joseph Fallows in the term subsequently devolved upon his grand son John Fallows, who continued during his lifetime in possession of the premises, and died in the year 1803. By his will John Fallows gave, devised, and bequeathed the mortgaged premises, together with all his other real and personal estate, to four trustees (two of whom he also named executors,) their heirs, executors, and administrators, and assigns, upon trust, after payment of certain legacies to sell and convert the same into money, according to their discretion, when his

(*a*) 1 Mer. 1, and the cases in the note.

(*b*) 1 Bro. C. C. 400.

[1] Vide *Beavan* v. *Waterhouse*, 2 Beav. 58.

youngest son should attain twenty-one, and to apply and distribute the produce among the testator's twelve children, and a grand child *nominatim*, in manner therein mentioned, with benefit of survivorship and accruer, if any of them should die under age; and he directed the receipt of his trustees to be a sufficient discharge to purchasers. The bill was filed against [*742] the surviving trustees and the personal *representatives of John Fallows, for a redemption of the mortgage.

At the hearing it was objected by the defendant's counsel, that the *cestuis que trust* under the will of John Fallows, and those claiming under them, were not made parties; and the Vice-Chancellor (Sir J. Leach) having allowed the objection and directed the cause to stand over, with liberty to the plaintiff within a month to amend his bill by adding parties, an appeal was brought from that order.

Mr. *Wray*, for the plaintiff, submitted, that inasmuch as the trustees were competent to give discharges to purchasers, and had by the will, the absolute dominion over the property, it was not necessary to make the *cestuis que trust* parties; their interests would be sufficiently protected by the trustees. There was no imperative rule which prevented the court from exercising a reasonable discretion on the subject; *Yates* v. *Hambly*,(*a*) the principles of which were recently approved by the Lord Chancellor of Ireland, Sir A. Hart, in *Bifield* v. *Taylor*.(*b*) The property here was so small, and the persons beneficially interested under the will were so numerous, for some of them had died leaving issue, after their shares had vested,) that to insist upon bringing them all before the court, would be tantamount to denial of justice, as the costs would far exceed the value of the surplus.

Mr. *Treslove*, contra, relied upon *Calverley* v. *Phelp*;(*c*) and he also contended, that an appeal against an order directing a cause to stand [*743] over for want of parties, with *liberty to amend, could not be entertained. Such an order was always made by consent. The plaintiff ought to have let his bill be dismissed, and have thereupon appealed: *Beresford* v. *Adair*.(*d*)

August 18.—The Lord Chancellor:—I think there is not sufficient in this case to justify me in rescinding the order of the Vice-Chancellor. The case of *Yates* v. *Hambly*(*e*) does not, in my opinion, support the application. Lord Hardwicke said in that case, that "where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties." In the

(*a*) 2 Atk. 237. (*b*) 1 Beattie, 91.
(*c*) 6 Mad. 229. See *Adams* v. *St. Leger*, 1 Ba. & Be. 181.
(*d*) 2 Cox, 156. (*e*) 2 Atk. 237.

present case there does not appear to have been any such intention The testator directs the property to be sold, and the produce to be apportioned among his children, and one grand child. They happen to be thirteen in number, but it does not appear to me that that is a sufficient ground for departing from the usual rule. And I consider it necessary in this case that the parties entitled under the will should be made defendants to the suit, as provided by the order of the Vice-Chancellor.[1]

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*Prebble v. Boghurst. [*744]

1830; August 6.

Under an award in a cause, which award was afterwards made an order of court, the costs of certain parties were directed to be taxed and paid to them out of the fund: a part of those costs was incurred in proceedings, upon a case sent to law; when the bills were carried in for taxation, it was discovered that the person who had acted as their solicitor throughout the the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the master thereupon disallowed all the items in the bills except disbursements to the clerk in court and his taxation was confirmed on appeal.

In this cause an award, which was subsequently turned into an order of court, provided that the petitioner's costs should be paid out of the assets in the hands of the defendants, the executors in the pleadings mentioned; and a reference was then made, directing that those costs should be taxed, and that the executors should be at liberty to pay them, when taxed to Mr. Robins the person who had acted as solicitor for the petitioners throughout the progress of the suit.

Robins' bill of costs amounted to upwards of 1200*l.*; a portion of which had been incurred in the proceedings upon a case sent to law for the opinion of the court of common pleas, upon a question arising in the chancery suit; the rest consisted of his ordinary costs and charges as a solicitor, and of fees and disbursements to the clerk in court, whom he employed on behalf of his clients. When those bills of costs, intituled in the cause were carried into the office for taxation, it was there discovered and objected, that although Robins was a regularly admitted attorney at law he was not then, and never had been, a solicitor of the court of chancery; and the master, upon that ground disallowed the whole of the bills, with the exception of the sums paid to his clerk in court.

The petitioners set forth these facts, and farther stated, that before the award was made an order of court, they had satisfied the full amount of Mr. Robins' bill; and that after the reference for taxation, but previously to the

(*a*) 2 Cox, 156. (*b*) 2 Atk. 237.

[1] Vide *Jossling* v. *Kerr*, 3 Beav. 494. *Wardell* v. *Claxton*, 1 Yo. & Coll. C. C. 265. *Schenck* v. *Ellingwood*, 3 Edw. Ch. Rep. 175.

[*745] master's certificate, that gentleman had *been duly admitted as a solicitor; and they prayed that the master might be directed to review his taxation, and might tax all the said bills of costs pursuant to the award and the orders consequential thereupon.

The petition having been dismissed in the court below,(a) it was brought by appeal before the Lord Chancellor.

Mr. *Horne* and Mr. *Wakefield*, in support of the petition, contended, that though the arbitration grew out of a suit, inasmuch as it took place under an order of court made in a cause, it was not in itself a proceeding in the court of chancery. It was the decision of the arbitrator, and not the decree of the court, under which the petitioners were entitled to be paid their costs; and these became by the award a debt personally due to the parties. The right to costs was a right which belonged not to the solicitor, but to the party; and no other person could legally receive them, unless authorized by a power of attorney so to do. *Reeder* v. *Bloom*.(b) To the extent, at least, of the costs incurred in proceedings before the arbitrator, (which any person, whether a solicitor or not, was competent to conduct,) the claim of the petitioners, against whom Robins might have recovered such costs by action, ought certainly to be allowed; and as Robins was an attorney at law, his charges relative to the case in the common pleas fell within the same principle.

The *Solicitor General* and Mr. *Roupell*, contra.

November 22.—The Lord Chancellor dismissed the appeal.(c)

[*746] *Coates *v.* Hawkyard.

Rolls.—1831; July 28.

After the plaintiffs' costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor; and an order was thereupon made, that the master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded.

It appeared by the petition of the plaintiffs, which was verified by affidavits, that a person of the name of Gibbon, who represented himself to be a solicitor had advised and induced the petitioners to institute a suit, for the purpose of taking the accounts of a testator's estate, and having the trusts of his will declared and carried into execution; that they accordingly filed their bill in this court and employed Gibbon as their solicitor to act on their behalf in the conduct of the cause; that by the decree on further directions the costs of all parties were directed to be taxed as between solicitor and client, and paid out of the fund in the hands of the receiver; and that under that order Gibbon's

(a) 2 Sim. 246. (b) 3 Bingh. 9. (c) See the two following cases.

bill of costs against the plaintiffs, having been taxed at the sum of 527*l.*, was paid by the receiver accordingly.

The petitioners stated that after Gibbon's bill had been thus paid, they had discovered, as the fact was, that Gibbon was not then and never had been a solicitor of the court; that in his bill of costs he had charged and been allowed various sums, which the master would not have allowed had the fact been then known that Gibbon was not a solicitor: and they prayed it might be referred back to the master to review his taxation, with directions to disallow such charges in the bill as a person not being a solicitor was not entitled to claim; and that Gibbon might be thereupon ordered to refund so much as upon such review should be disallowed.

It appeared by Gibbon's affidavit in reply that, though not a solicitor in this court, he was an attorney at law, and a master extraordinary in chancery.

*Mr. *Bickersteth* and Mr. *Teed*, for the plaintiffs, supported the [*747] application.

Mr. *Cooper*, for Gibbon, opposed it.

The Master of the Rolls made the following order:—"It appearing that the costs were taxed on the supposition that Mr. Gibbon was a solicitor, and it being admitted that he was not a solicitor, let the master review his report with reference to that fact; let Mr. Gibbon refund to the receiver what, if any thing, shall be disallowed upon such review, and let him pay the costs of this application."

The master, on reviewing his taxation, allowed all the costs which Gibbon claimed in respect of disbursements actually made by him in the conduct of the suit. The plaintiffs thereupon presented another petition, praying that it might be refered back to the master, to review his report, and that he might be directed to disallow all the items in the bills, with the exception of those charged on account of fees and disbursements paid by him to the clerk in court who had been concerned for the plaintiffs in the cause.

1832; *January* 12.—The Master of the Rolls made an order accordingly.

[*748] SUMNER v. RIDGWAY.

1831; July 29.

It appearing upon a reference to tax an agent's bill of costs in a chancery suit, that he never had been a solicitor of the court, the master was directed to disallow all the items, except those for disbursements made to his clerk in court.

ON the petition of the defendants, Massey and his wife, stating that they had employed T. Littler, a solicitor of the court, to conduct this, as well as other suits and matters on their behalf; and that, in the course of such employment, considerable costs had been incurred, for the recovery of which Littler had brought an action against them; the usual order was made, referring it to the master to tax Littler's bill of costs, and the legal proceedings were ordered to be stayed in the mean time, the petitioners submitting to pay what should be found due on such taxation. Another order was afterwards obtained by Littler, directing that his costs at law, up to the time when he was served with the order of reference, should be taxed and paid to him.

It was subsequently discovered, that although Littler was an attorney at law, he had never been admitted a solicitor in the court of chancery; and as all the items in his bill related to costs and charges incurred in proceedings in chancery, an objection was taken, in the course of the taxation before the master, against allowing any of those items, except such as consisted of fees and disbursements which had been paid by him to the clerk in court employed for the defendants. The master, however, overruled the objection, and certified that he had taxed Littler's bill of costs, which amounted to 54*l.* 15*s.* 3*d.*, at the sum of 51*l.* 12*s.* 8*d.*

Against this certificate a petition was presented, praying that the master might be directed to review his report, and to disallow all the charges [*749] in the bill except *such as were made in respect of fees and disbursements advanced on account of the defendants to their clerk in court: and the Master of the Rolls, after hearing counsel, made an order accordingly.

From this order Littler appealed to the Lord Chancellor.

Mr. *Pepys* and Mr. *Spence* for the appeal.

Mr. *Sharpe*, in support of the order, referred to *Coates* v. *Hawkyard*,(*a*) and *Prebble* v. *Boghurst*,(*b*) as decisive of the question.

THE LORD CHANCELLOR(*c*) affirmed his honor's order.

(*a*) Ante, p. 746. (*b*) Ante, p. 744. (*c*) Lord Brougham.

*BINGHAM *v.* WOODGATE. [*750]

1831; June 11.

THE exceptions in this cause (reported ante, p. 32,) came on to be heard before Lord Brougham, chancellor, and were argued at considerable length by Sir *Edward Sugden*, Mr. *Pepys*, and Mr. *Stuart* in support of the exceptions and by the *Solicitor General* (Sir *W. Horne*) and Mr. *Preston*, for the respondents. In the course of the discussion, it was admitted on both sides, that the statement in the note, p. 32, ante, was applicable not to one only, but to all of the conveyances of the customary tenements in question. In addition to the cases cited in the court below, reference was made to *Hunt* v. *Burne*,(*a*) and *Hughs* v. *Harrays*.(*b*)

At the close of Mr. *Preston's* argument, the Lord Chancellor intimated that his own opinion leant strongly in favor of the exceptions; and he said, that if he were called upon to determine the point at once and without assistance, he should feel obliged to come to a different conclusion from that of the Master of the Rolls. As the question, however, was one of some nicety and importance, instead of deciding it himself, he would give the vendor the option of a case at law, if he felt disposed to carry the matter farther. And the respondent having, by his counsel, accepted the offer, his Lordship accordingly directed a case to be stated for the opinion of the court of king's bench.

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*ATTORNEY GENERAL *v.* PEMBROKE HALL. [*751]

1829; November 9, 12.

IN this case (which is reported in the court below, in 2 Sim & Stu. 441,) an appeal was brought from that part of the Vice-Chancellor's decree which declared the defendants to be entitled to the surplus rents and profits of Palmer's Fields for their own use.

The *Solicitor General*, Mr. *Pemberton*, and Mr. *W. Brougham*, for the appellants.

Mr. *Horne* and Mr. *Simpkinson*, for the college.

1830; *June* 1.—THE LORD CHANCELLOR affirmed the judgment of his honor.[1]

(*a*) 1 Salk. 57. (*b*) Cro. Ch. 229.

[1] The principle upon which the Vice-Chacellor proceeded in the above case is best expressed in his own words:—"I cannot think it the office of a court of equity, at the distance of more than two centuries, to undo an arrangement which was perfectly fair at the time between the contracting parties, and was sanctioned with the full approbation of the executor of the founder, and has become unequal only from accidents arising out of the course of time." See *The Attorney General*

[*752] *ROBERTS v. WALKER.

ROLLS.—1830; July 27, August 2.

Personal property, not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown.

Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies: and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate to the heir, and, as far as it is composed of personal estate to the next of kin.

SARAH WHITE by her will, dated the 31st of May, 1822, gave various legacies, and devised a "copyhold tenement to Hannah Dean for her life, and subject to the bequests and devises thereinbefore contained, so far as the same extended," she gave and bequeathed unto Thomas Walker and Thomas Gould, their heirs, executors, administrators, and assigns, certain freehold and copyhold messuages therein particularly described; "also all that her leasehold messuage or dwelling house, with the appurtenances, situate in Canal street in Wolverhampton, &c.; also all her household goods, furniture, plate, linen, bedding, and other household effects, eight shares in the British Fire Office, six shares in the Birmingham New Brass Company, ten shares in the Birmingham Mining Copper Company, ten shares in the Birmingham and Worcester Canal, stock of copper and brass, moneys out on mortgages, bonds, notes of hand, and other securities, and the securities on which the same were invested, ready moneys, book debts, and all and singular other her real and personal estates whatsoever and wheresoever that she should die possessed of, interested in, or in any wise entitled to; and also all and singular the messuages, lands, tenements, and hereditaments whatsoever, which at the time of her decease should be vested in her either in fee or during any life or lives, or for any term or number of years or otherwise, by way of mortgage, for securing any sum or sums of money, to hold the same messuages, lands,
[*753] hereditaments, *real and personal estates, and all other the premises thereinbefore mentioned (subject as therein aforesaid) unto and to the use of them the said Thomas Walker and Thomas Gould, their heirs, executors, administrators, and assigns respectively, for, during, and to the full extent of her estate, right, title, and interest therein and thereto, according to the nature, quantity, and quality thereof respectively, upon trust, as soon as conveniently might be after her decease (and subject to the said devise for the

v. *The Mayor &c. of Exeter*, 3 Russ. 395; *Same* v. *Wray*, Jac. 307; *Same* v. *Buller*, id. 407, 413; *Same* v. *Cullum*, 1 Keen, 104, 119, n. 2; *Same* v. *Crook*, id. 121; *Same* v. *Caius College*, 2 Keen, 150; *Same* v. *Kerr*, 2 Beav. 420, 428; *Same* v. *Brettingham*, 3 Beav. 91; *Same* v. *Drapers' Company*, 4 Beav. 67; *Same* v. *Christ's Hospital*, id. 73; *Same* v. *The Skinner's Company*, 5 Sim. 596. From the above cited cases it may be deduced:—that it is the disposition of the court to sustain the *bona fide* acts of the trustees of a charity, where a considerable length of time has intervened.

life of the said Hannah Dean), to make sale and dispose of, either by public auction or private contract, and in such lots as to them or him should seem meet, all her freehold, copyhold, and leasehold messuages, lands, seat or pew, hereditaments, and premises, and all other her real estate, for such price or prices in money as they or he should deem sufficient; and also to sell, dispose of, collect, get in, and convert into money all and singular her said personal estate bequeathed to them as aforesaid, as soon as conveniently might be after her decease; and as to the moneys arising from such sale and conversion of her said real and personal estates, and as to the rents and profits of her said real estates, until the same should be sold, upon trust, in the first place, to pay, satisfy, and discharge all her just debts, funeral expenses, and all the costs, charges, and expenses which her said trustees and executors should be put unto in proving, fulfilling, and carrying into execution the trusts and purposes of her said will, and in the next place, to pay the several legacies therein mentioned unto the several persons thereinafter named to whom she thereby bequeathed the same; all which said legacies" she directed should respectively be paid at or calculated from the expiration of twelve calendar months after her decease, or so soon afterwards, as there should be funds applicable thereto, with lawful interest for any time which *should elapse [*754] from the said expiration of twelve calendar months: and she directed that her said trustees, or the survivor of them, his executors, administrators, and assigns, should, by and out of the said trust moneys, pay and apply such sum and sums of money as should be sufficient to pay all and every legacy duty and duties payable to government in respect of all the said several bequests payable out of the said trust moneys, so that the said legatees respectively might have and enjoy the same bequests entire and without any deduction or abatement whatsoever in respect of legacy duty: and she also directed that, in case any of her said legatees should be then dead, or should die in her lifetime, having left children or a child, such children or child should have and take the legacy thereby given to their, his, or her parent or parents respectively, in equal proportions, if more than one: and as to all the residue of the said trust moneys, she directed her said trustees and the survivor, his executors, administrators, or assigns, to pay and apply the same to and for the benefit of such person or persons, in such parts, shares and proportions, manner and form, at such time or times as she should, by any codicil or codicils to her said last will and testament, give and bequeath, direct or appoint, of and concerning the same, she not having then yet made up her mind in what manner she should dispose of such residue.

The testatrix died in July, 1822, without having made any codicil, or any further disposition of her real or personal estate.

William Turton White was one of her next of kin living at the time of her decease. In March, 1818, having been convicted of simple larceny at the Warwick assizes, he received sentence of transportation for fourteen *years, but judgment of death was not recorded against him; and, in [*755]

pursuance of his sentence, he had been sent to New South Wales, where he still was.

There were two questions in the cause:

1. Whether William Turton White's share of the personal effects of the testatrix was forfeited to the crown.

2. Whether the debts and legacies of the testatrix were to be satisfied out of her personalty, as far as it would extend, in exoneration of the real estate, and for the benefit of the heir; or, whether they were to be borne by the real and personal estates proportionally.

Mr. *Wray*, for the crown, on the first point:—In *Foxley's case*,(a) Lord Coke says, "At common law the goods of a clerk, convict by verdict or confession, were forfeited to the king, not only all which he had at the time of the conviction, *but all the goods which he got afterwards, until he had made his purgation or gotten his pardon*, &c. And in case when he could not make his purgation, or in case when he could make purgation, *till purgation made, he remained a person disabled to take goods to his own use;* and, therefore, question hath been made upon the statute of 18 Eliz. c. 7, by which it is enacted, that, after clergy allowed, and burning in the hand, the prisoner shall be presently enlarged and delivered out of prison; if one after the statute is convicted of felony, and has his clergy, and is burnt in the hand, and afterwards acquires goods, he shall forfeit his goods which he acquires after, till [*756] he obtains his pardon; for now he *cannot make purgation, and peradventure the cause or offence was such, that he could not make purgation. And (Pasch. 41 Eliz.) this doubt was resolved; for in action on the case on trover, brought of certain goods by Hesdon, as administrator of Riddleson, against Masterson, the defendant pleaded, that before the trover, the intestate was convicted of felony, and burnt in the hand, and afterwards acquired the said goods, on which the plaintiff demurred in law; and it was adjudged for the plaintiff, forasmuch as the statute has taken away the ordinary means and power from him who might make purgation, which was the ordinary means to make him capable of goods to his own use; and as to him who cannot make his purgation, forasmuch as by the said act it was enacted, that he shall be presently enlarged and delivered, which is in lieu of a pardon by good construction, the same act has made him as capable in both cases to purchase goods to all purposes, as if he had made his purgation in the one case or obtained his pardon in the other." It is, therefore, clear that a person convicted of clergyable felony forfeited not only all the chattels which he had at the time of his conviction, but all such as he might acquire between conviction and the complete satisfaction of the law, either by his being burnt in the hand, or by his having obtained a pardon. The 4 G. 1, c. 11, and 6 G. 1, c. 23, substituted transportation for burning in the hand; and provided, that where an offender had served the term for which he was transported, such ser-

(a) 5 Rep. 110.

vice should have the effect of a pardon; consequently, a person convicted of a clergyable felony and sentenced to transportation, continues incapable of acquiring property for his own benefit, until he has obtained a pardon or has completed the term of his transportation. *Rex* v. *Burridge*,(*a*) *Tombes* v. *Ethrington*,(*b*) *Blackstone's Commentaries*.(*c*) In *Bullock* [*757] v. *Dodds*,(*d*) it was held, that a person convicted of felony, upon whom judgment of death had been pronounced, but whose sentence had been commuted into transportation, was not restored to his civil rights till after the expiration of the term for which he had been ordered to be transported, and that all personal property accruing to him either before or after conviction became vested in the crown. The 5 G. 4, c. 94, s. 26, enables felons, who have received from the governor of the colony a remission of the whole or part of their term of transportation, to maintain actions; a provision which implies that, without such an enactment, they were not capable of acquiring any title to property.

Mr. *Tinney*, contra:—The *dictum* of Lord Coke is not confirmed by any decided case; and no instance can be produced in which chattels, accruing after conviction to a person convicted of a clergyable felony, have been claimed or seized by the crown. In *Bullocks* v. *Dodds* judgment of death had been pronounced; the person was an attainted felon: and from the time of attainer he was *civiliter mortuus* and altogether incapable of any civil rights. But the doctrine of attainder has no application to conviction for mere clergyable felonies; and that statute pardon, which is necessary in order to revive in an attainted person the capacity of having civil rights, is not needed, where no attainder has occurred to extinguish that capacity.

The 19 G. 3, c. 74, s. 3, authorizes the court, instead of burning in the hand, to impose a moderate pecuniary fine on a person convicted of felony within the benefit of clergy; could any enactment be more ridiculous, if it *was impossible for such a felon to have any property before the [*758] fine was paid? How was the fine to be paid, if all property, to which he might have any title before payment, belonged to the crown?

On the second point Mr. *Tinney* cited *Ackroyd* v. *Smithson*(*e*) as an authority which proved, that, where a testator formed one mixed fund of the produce of his real and personal estate for the payment of debts and legacies, and the disposition of the residue, by reason of lapse or otherwise, was not complete, the debts and legacies were not to be thrown in the first place or exclusively on that portion of the fund which arose from personalty, but were to be apportioned between the produce of the personal and the produce of the real estate in the ratio of their respective amounts. Such,

(*a*) 3 P. Wms. 462. (*b*) 1 Levinz, 120. (*c*) Vol. iv. pp. 365—375]
(*d*) 2 Barn. & Ald. 258. (*e*) 1 Bro. C. C. 503.

he said had for many years been the establised course of the court in all cases of this kind. *Attorney General* v. *The Earl of Winchester*.(a)

Mr. *Wray*, for the crown, was in the same interest.

Mr. *Pemberton* and Mr. *Lynch*, for the heir.

In *Ackroyd* v. *Smithson* no question was raised as to the apportionment of the debts and legacies between the two portions of the fund; and that case is, therefore, no authority upon the point. In the *Attorney General* v. *Winchelsea* the debts and legacies were apportioned, not between the per-
[*759] sonal estate and the real estate, but *between two classes of personal estate, namely, the general personal estate and moneys secured by mortgages; which two classes, though different parties were interested in them, were alike liable by law to bear the burden of debts and legacies. In *Paice* v. *The Archbishop of Canterbury*(b) the testatrix gave all her real and personal estates in trust for the "following purposes;" these purposes were for the payment of debts and legacies, and then for charitable uses. One question discussed was, whether the money produced by the sale of the leaseholds and freeholds was liable to any part of the debts, legacies, and costs; and it was held that the freehold estate was not to be burdened with any part of the debts or legacies, or of the general costs of the suit.(c) That is a con-

(a) 3 Bro. C. C. 375. The decree in the *Attorney General* v. *Winchelsea*, is given in Seton's Forms of Decrees in Equity, page 150.

(b) 14 Ves. 364.

(c) PAICE v. THE ARCHBISHOP OF CANTERBURY.

The decree in that case is as follows:—"Declare that the money due on mortgage of the house in Grosvenor square, ought to be paid out of the money arising from the sale of such house; and that all other the debts and funeral expenses and legacies of the testatrix (and a certain sum of 93*l.*,) ought to be paid out of the residue of the money produced by sale of her leasehold estates, and out of her other personal estate *pro rata*; and it is ordered, that the master do apportion the same accordingly.

"Declare that the costs of this suit (except the costs of any proceedings to be had under the directions hereinafter given for carrying into effect the charitable purposes of the said testatrix, which are to be paid out of such part of the residue of her personal estate as is applicable to such charitable purposes,) ought to be paid out of the personal estate of the said testatrix, and the rents and profits and produce of such part of her real estate as is by her will directed to be sold in the manner and proportion following; that is to say, so much of such costs as relates to her real estates, out of the rents, profits, and produce of such part of her real estate as is by her said will directed to be sold as aforesaid; and the residue of the costs of this suit, except as aforesaid, out of the moneys arising from the sale of the leasehold estates of the testatrix, and out of her other personal estate *pro rata*; and it is ordered, that the master do apportion the costs hereinbefore directed to be taxed, and which have already been taxed accordingly.

"Declare, that the real estate did not pass by the devise thereof to the charitable uses contained in the will, and that the rents and profits of the real estates of the said testatrix, devised by her will to be sold as aforesaid, accrued since the death of the said testatrix, and the money produced by the sale thereof subject to the proportion of the costs of this suit directed to be borne thereout, belong to the heir at law.

"Declare, that the leasehold estates of the testatrix did not pass by the bequest thereof to the charitable uses contained in her will, and that the money produced by the sale thereof (after

clusion which follows from the *settled doctrine of the court, that [*760] the personal estate is not exempted from the payment of those charges which it is primarily liable to bear, unless by plain words or necessary *inference; and that inference is not furnished by a de- [761] vise of real and personal estate, subject to debts and legacies, or upon trust to sell and pay debts and legacies, unless upon the whole will there be a manifest intention to exonerate the personalty. In the will of the present testatrix there are neither express words declaring that the personal estate, as far as it may extend, is not to bear the whole burden of debts and legacies, nor any clause from which an inference can be drawn that such was the intention of the testatrix. The principle, on which the decree was made in *Paice* v. *The Archbishop of Canterbury*, was followed in *Crosbie* v. *The Mayor of Liverpool*, decided at the rolls on the 8th of February, 1821 :(*a*)

deducting a certain mortgage,) and subject to the proportions of the testatrix's debts, funeral expenses, and legacies, and the sum of 93*l.*, and the costs of this suit directed to be borne thereout, belongs to the next of kin of the said testatrix, living at her death.

"Declare, that the clear residue of the personal estate of the said testatrix, exclusive of what has arisen from the said leasehold estates, subject to the proportion of the debts, funeral expenses, and legacies, and of the sum of 93*l.*, and of the costs before directed to be borne thereout, is well given to the Archbishop of Canterbury and the Archbishop of York for the time being, in trust for charitable purposes."

Reg. Lib. B. 1806, fo. 1220.

The only passage in the judgment in *Paice* v. *The Archbishop of Canterbury*, which relates to the apportionment of the debts and legacies, is the following:(*)—"The same arrangement must take place by apportionment of the charges between the funds, as in the case of *The Attorney General* v. *Winchelsea*." But *The Attorney General* v. *Winchelsea*, only decided affirmatively, that there was to be apportionment as between that part of the personal estate which was lent out on mortgage, and the general personal estate; it did not decide negatively that there ought not to be an apportionment as between freeholds and personalty; and, therefore, the expressions of Lord Eldon, as reported, do not go far enough to sustain the decree as drawn up.

(*a*) CROSBIE v. THE MAYOR OF LIVERPOOL.

Joseph Hunt gave his real estate and the residue of his personal estate, to his executor, upon trust, after the death of his wife to convert it into money; and, after payment of legacies, some of which were to charities, he gave the residue to the corporation of Liverpool, on charitable trusts.

The executor sold the real estate.

The original decree declared, that the bequests of so much of the legacies to charitable uses, and the trusts of so much of the residue which was given to charitable uses, as arose from the real and leasehold estates, were void by the statute 9 G. 2, c. 36.

It appeared by the report that J. Hughson, who was made a party by supplemental bill, was the personal representative and heir at law of J. Darlington, the testator's heir at law; and that the personal estate amounted to 1386*l.* 0*s.* 5*d.*, of which 928*l.* 16*s.* 2*d.* consisted of money due on mortgage, and the produce of leaseholds; and the debts, funeral expenses, and legacies, amounted to 879*l.* 7*s.* 6*d.* The decree on further directions, was as follows:—"This

(*) 14 Ves. 372.

[*762] and so much of a residue given to charity as *consisted of money produced by the sale of freeholds, was ordered to be paid over to the representatives of the heir, without contributing towards the payment of [*763] *any of the testator's debts or legacies. In *Chitty* v. *Parker*,(a) a testatrix directed all her property, real and personal, to be sold and turned into money, "which I give and devise as follows;"—she then ordered her debts to be paid, and gave several legacies, some of which lapsed. The personal estate being more than sufficient for the payment of the debts and legacies, the question in the cause between the next of kin and the heir at law was, whether any part of the real estate ought to be sold. According to the doctrine contended for here by the next of kin, the debts and legacies ought to have been borne by the personal estate and the real estate *pro rata*. But Lord Thurlow was of a contrary opinion, and held that the heir at law was entitled to the whole of the real estate, and the next of kin had no right to call for a sale. In *Hill* v. *Cock*(b) a testator, after some specific devises and bequests, gave and devised all other his freeholds and leaseholds, together with all his personal estate, upon trust to sell the same, and out of the moneys thence arising to pay certain costs and charges; and by a codicil he gave some legacies, which he directed to be paid out of his real and person- [*764] al estate: by the decree the personal *estate was directed to be first applied in payment of the debts and legacies. In *Smith* v. *Claxton*,(c) the proceeds of the real and personal estate were formed into a mixed fund for the payment of debts and legacies; yet the debts and legacies were paid out of the personal estate exclusively. That circumstance is adverted to in the

court doth order, that it be referred to Mr. J., &c. to ascertain how much of the sum of 1386*l.* 0*s.* 5*d.* certified by the said master to be the amount of the testator's personal estate, come to the hands of the plaintiff, his executor, has arisen from leaseholds and money due on mortgages; and to ascertain how much has arisen from other particulars: and it is ordered that the said master do apportion the debts, legacies, funeral, and testamentary expenses of the said testator, between so much of the personal estate as he shall find to have arisen from leaseholds and the money due on mortgages, and so much thereof as he shall find to have arisen from other particulars, according to their respective values; and it is ordered, that he do also tax, as between solicitor and client, the costs of these suits of all parties, and apportion the same between the produce of the real estate of the said testator, such part of the said personal estate as he shall find to have arisen from leaseholds and moneys due on mortgage, and so much thereof as he shall find to have arisen from other particulars, in like manner as hereinbefore directed, as to the debts and legacies, funeral and testamentary expenses; and it is ordered, that such costs, when so taxed and apportioned, be paid by the plaintiff out of the said several estates, according to such apportionment; and this court doth declare, that the residue if any) of the personal estate, which has not arisen from leaseholds or money on mortgage, will be applicable to the purposes of the charity, and that the residue of such personal estate as the master shall find to have arisen from leaseholds and money on mortgage, will belong to the defendant H. H. and M., his wife, as the only next of kin of the said testator; and that the residue of the produce of the real estate will belong to J. Hughson, the defendant in the supplemental suit, as the personal representative of the heir at law of the testator; and any of the parties are to be at liberty to apply to this court as there shall be occasion."

Reg. Lib. A. 1830, f. 1362.

(a) 4 Bro. C. C. 411. (b) 1 Ves. & B. 173. (c) 4 Mad. 484

judgment; "the debts and legacies," says the Vice-Chancellor, "are well paid out of the personal estate:"(a) and no intimation is given that a different course of administration ought to have been followed. In *Howse* v. *Chapman*,(b) a testator directed a share in the Bath navigation and various descriptions of personal property to be sold, and the proceeds of the sale to be applied in paying his debts and legacies; and he gave the residue to a charitable purpose. The decree at the hearing(c) declared that the navigation share descended to the heir at law; and by the decree on further directions the personal estate exclusively was applied in payment of the testator's debts and legacies. *Inchiquin* v. *French*,(d) is an authority to the same effect. *Southouse* v. *Bate*.(e) From all these authorities the conclusion is, that the real estate, or the produce of the real estate, ought not to contribute to payment of debts and legacies, unless the personalty shall prove insufficient.

Mr. *Tinney*, in reply:—In *Inchiquin* v. *French* the question was, whether the real estate was charged with debts and legacies, so as to exonerate the personalty; and the court was of opinion that the personalty was not exonerated, and that the real estate was charged only as a subsidiary fund. *Chitty* v. *Parker* may have proceeded on a similar *principle; but it [*765] is probable that the question of apportionment was not there brought under the consideration of the court; for the question argued was, whether the real estate was to be considered as so completely converted into personalty that the next of kin were entitled to claim it against the heir. In *Hill* v. *Cock* the debts and legacies were first charged on specific property; and the general mass of real estate was charged only as a subsidiary fund. Such cases have no application, where the testator constitutes one mixed fund, composed partly of realty and partly of personalty, and throws on the whole certain common charges. It was sometime before it was settled in the administration of charities, that where debts and legacies, some of which were to charity, were given out of a fund consisting of the proceeds partly of freeholds, partly of leaseholds, and partly of personal chattels, the burden ought to be apportioned acccording to the value of the three funds respectively. That principle was not followed in the decree in *Paice* v. *The Archbishop of Canterbury* and the other cases of charity which have been referred to.

The question is simply, what was the intention of the testatrix? She has directed her real and personal estate to be sold, and, after payment of her debts and legacies, has expressed her purpose to dispose of the residue by a codicil. She never made a codicil; and it is only the residue of this mixed fund which is not disposed of. How can the heir claim the whole of the produce of the real estate, when a residuary legatee, appointed by the codicil, would have taken it, subject to a proportional share of the debts and legacies? The proceeds of the real and personal estate being once blended into a common

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(d) 1 Cox, 1. (e) 2 Ves. & B. 396.

mass, out of which the debts and legacies are to be paid, how can it be argued that the testatrix intended that the debts and legacies were to be a [*766] *charge, not on the whole of the fund thus constituted, but merely on a portion of it, arising from a single source.

August 2.—THE MASTER OF THE ROLLS:—In this case two questions are made; first whether personal property, not belonging to a felon sentenced to transportation at the time of his conviction, but which accrued due to him afterwards, during the term of his transportation, is forfeited to the crown? And, secondly, where a testator directs his real and personal estate to be converted into money, and the mixed fund to be applied to certain stated purposes, and some of those purposes fail by lapse or otherwise, whether the remaining purposes, which are in their nature primary charges upon the personal estate, are to be satisfied out of the personal estate, as far as the same will extend, in exoneration of the real estate, for the benefit of the heir, or whether the remaining purposes are to be satisfied out of the real and personal estate *pro rata*.

The first point appears to be settled by the case of *Bullock* v. *Dodds*;(*a*) and a felon, until the term of his transportation has expired, is not restored to his civil rights.[1]

With respect to the second point, it does not appear that the attention of the court has been distinctly called to it in any of the numerous cases in which the facts would have raised the question, and there would be great difficulty to reconcile the different decrees which have been made upon this [*767] point. The question is of *great importance by reason of its frequent recurrence, and is to be carefully considered. It is a question of intention; and it must be admitted, that, in order to throw upon the real estate any part of the burden to which the personal estate is primarily liable, the intention of the testator must be manifest.[2] When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes and every of them *pro rata* according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those puposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of;[3] and as far as this part

(*a*) 2 Barn & Ald. 258.

[1] Vide *Stokes* v. *Holden*, 1 Keen, 145.

[2] Vide *Welby* v. *Rockliffe*, ante, 574. *Driver* v. *Ferrand*, ante, 681.

[3] "I apprehend it to be clearly settled, that when a testator devises land to be sold, and directs the produce of the sale to be applied for purposes which do not exhaust the whole beneficial interest,

of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and the next of kin respectively, it must be referred to the master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund.[1]

The decree contained, among other directions, the following:—"His honor doth declare the crown entitled to the share of William Turton White of and in the personal estate of the testatrix;—and it is ordered, that the master do apportion the legacies (except the charitable legacies,) funeral expenses, and debts of the testatrix, and also the costs of this suit up to and including his *further report, between the testatrix's real and personal [*768] estate, in proportion to their respective values; for which purpose he is to set a value on the real estate and on the outstanding personal estate (if any,) and reserve the consideration how the proportion to be borne by the real estates, and any and what interest thereon are to be raised; and it is ordered that the rents of the real estates be received by the heiress at law *ex parte materna*; and his honor doth declare the heir at law *ex parte materna* entitled to the undisposed surplus of the freehold and copyhold estates, and doth declare that the freehold and copyhold estates are liable to a rateable proportion, with the personal estate, of the sums charged by the testatrix on the mixed fund."

Reg. Lib. B. f. 2355.

the interest which is not exhausted, belongs to the heir. Moreover, it is a rule, that the heir is not to be excluded by the fact of an actual conversion of the real estate into money, but only by the disposition which the testator has made of the unexhausted beneficial interest. So, when a testator having devised his real estate to be sold, has mixed the produce with the personal estate, and has given the combined fund for purposes which do not exhaust the whole beneficial interest, in that case, again, so much of the fund remaining undisposed of, or unexhausted, as consists of the produce of the real estate, belongs to the heir;—in other words, as was said by Lord Rosslyn, where the court had no direction from the testator how the money arising from any part of his real estate shall go, it rests with the heir at law; the consequence is, that in every case of this kind, the court must look to the disposition which the testator has made by his will, of the unexhausted interest arising from his real estate."—Lord Langdale, M. R., *Johnson* v. *Woods*, 2 Beav. 412.

[1] Vide *Eyre* v. *Marsden*, 2 Keen, 564. S. C. 4 Myl. & Cr. 231. *Stocker* v. *Harbin*, 4 Beav. 479.

23 November, 1831.

Orders for the Regulation of the Practice and Proceedings of the Court of Chancery, issued by the Lord High Chancellor, 23d November, 1831.

THE Right Honorable Henry Lord Brougham and Vaux, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honorable Sir John Leach, Master of the Rolls, and the Right Honorable Sir Lancelot Shadwell, Vice-Chancellor of England, doth hereby order and direct, that the orders of the 3d of April, 1828,[1] be amended as to numbers VI., XIII., XVI., XVII., XVIII., XIX., XXIV., and LXXVI., in manner following; that is to say,

VI.

THAT if the plaintiff do not, within three weeks after a defendant's second or third answer is filed, refer the same for insufficiency on the old exceptions, such answer shall thenceforth be deemed sufficient.

XIII.

THAT after an answer has been filed, the plaintiff shall be at liberty, before filing a replication, to obtain upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer, and before replication, unless the court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are [*770] considered *to be material to the case of the plaintiff; such affidavit to be made by the plaintiff, or one of the plaintiffs, where there is more than one, and his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs from being abroad or otherwise, shall be unable to join therein; but no order to amend shall be made after answer and before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers, if there be two or more defendants, is to be deemed sufficient. But this order shall not extend to amendments which are made only for the purpose of rectifying

[1] The orders of April 3d, 1828, are to be found at the end of the 2d volume of Russell, in the 3d volume, of the present series of English chancery reports. In the printing of those orders in the present edition the original paging which was in Roman figures, and not in Arabic figures, was not preserved, as it should have been. The amendments to those orders are given above, and these are succeeded by a new set of orders made by Lord Brougham. (December 21, 1833.) 1 Myl. & K., Appendix. The editor has been earnest that in the republication, the successive rules of court should be preserved, being sensible, that without them, many cases on matters of practice might be misunderstood or misapplied. There is a mass of subsequent general orders, by Lord Cottenham in 1841, and Lord Lynhurst in 1841, 1842, which will be found in the 3d vol. of Beavan, and the 1st volume of Phillips. The passion for judicial codification does not seem to be confined to one side of the Atlantic.

some clerical error, or error in names, dates, or sums; in which cases the order to amend may be obtained upon motion or petition, without notice.[1]

XVI.

That where the answer of a defendant is to be deemed sufficient, whether it be in term time or in vacation, if the plaintiff or plaintiffs shall not proceed in the cause, the defendant shall be at liberty, after the expiration of two months, to move, upon notice, that the bill be dismissed with costs, for want of prosecution; and the bill shall accordingly be dismissed with costs, unless the plaintiff or plaintiffs shall appear upon such motion, and give an undertaking to file a replication, and serve a subpœna to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the date of such undertaking: or unless the plaintiff or plaintiffs, without filing a replication, shall appear upon such motion, and give an undertaking to hear the cause as against the defendant making the motion upon bill and answer: or unless it shall appear that the plaintiff *or plaintiffs, is or are unable to pro- [*771] ceed in the cause, by reason of any other defendant or defendants not having sufficiently answered the bill, and that due diligence has been used to obtain a sufficient answer or answers from such other defendant or defendants;—in which case the court shall allow to the plaintiff or plaintiffs such further time for proceeding in the cause as shall appear to the court to be reasonable. And in case the plaintiff or plaintiffs do appear upon the motion to dismiss, and give the undertaking to file a replication, and take the other proceedings consequent thereon, hereinbefore required, then all the rules and regulations, with respect to the commission and the return thereof, and the setting down the cause for hearing, and the rights of the defendant with respect to the commission, in case of any default on the part of the plaintiff, which are particularly expressed in the next order, shall apply to all cases under this order.[2]

XVII.

That where the plaintiff files a replication, without having been served with a notice of motion to dismiss the bill for want of prosecution, he shall serve the subpœna to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the filing of the replication, and such commission shall, at the latest, be returnable on the first return of the second term then next following: and the plaintiff shall give his rules to produce witnesses, and pass publication at the latest in the same term, and shall set down his cause for hearing, and duly serve the subpœna to hear judgment returnable in the succeeding term; and if the plaintiff shall make default herein, then upon applica-

[1] Vide *Tarleton* v. *Dyer*, ante, 1. *Mendizabel* v. *Hullett*, ante, 324. *Bird* v. *Hustler*, ante, 325.

[2] Vide *The Corporation of Dartmouth* v. *Holdsworth*, 9 Sim. 393.

tion by the defendant, upon notice of motion, the plaintiff's bill shall [*772] stand dismissed out of court with *costs, unless the court shall make special order to the contrary. And in case the plaintiff serves a subpœna to rejoin, within three weeks after filing the replication, but does not obtain and serve an order for a commission to examine witnesses within that time then the defendant shall be at liberty, without notice, to obtain an order for a commission to examine witnesses, returnable at the like period as the plaintiff is entitled to, pursuant to this order, and shall have the carriage of such commission. And if the plaintiff obtains an order for, and sues out a commission, and neglects to execute and return the same, at or within the time stated in this order, the defendant shall be entitled to an order as before stated, for a commission returnable on the last return of the term following that which is allowed to the plaintiff by this order, for the return of his commission. And when any commission issues pursuant to this order, or the last foregoing order, the parties shall have liberty to execute the same in term time, and publication shall stand enlarged until the commission shall be returnable; and the plaintiff shall be at liberty to set down the cause, in the mean time, without the necessity of inserting such directions in the order for the commission.[1]

XVIII.

That publication shall not be enlarged except upon special application to the court, made upon notice supported by affidavit, and at the cost of the party applying, unless otherwise ordered by the court.[2]

XIX.

That the time which occurs between the last seal after Trinity term, and the first seal before Michaelmas term, and between the last seal after Michaelmas term, and the first seal before Hilary term, shall not be [*773] *reckoned in the computation of time which is allowed to a party for amending any bill, for filing, delivering, or referring exceptions to any answer, or for obtaining a master's report upon any exceptions.

XXIV.

That when a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, he shall not by such acceptance be compelled, in the event of the answer being insufficient to re-commence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded.

[1] Vide *Smith* v. *Oliver*, 3 Myl. & Craig, 165. *Brown* v. *Moore*, 2 Sim. 464. *Crook* v. *Trery*, 3 Myl. & Cr. 168. *White* v. *Smith*, 1 Keen, 381. *Rayson* v. *Lees*, id. 14. *Strickland* v. *Strickland*, Cr. & Ph. 151. *Burgess* v. *Thompson*, 2 Keen, 772. *Walmsley* v. *Froude*, ante, 334. *Williams* v. *Janaway*, 9 Sim. 383. *Williams* v. *McDonnell*, id. 400

[2] Vide *Brown* v. *Brown*, ante, 77.

23 November, 1831.

LXXVI.

That where a master is directed to settle a conveyance, or to tax costs in case the parties differ about the same, then the party claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs, or the draft of the conveyance into the master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, and may take a copy thereof, if he thinks fit. And at or before the expiration of the eight days, or such further time as the master shall in his discretion allow, he shall then either agree to pay the costs or adopt the conveyance, as the case may be, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs, or to deliver a statement in writing, of the alterations which he proposes in the draft of the conveyance. But if he make no such tender, nor deliver any such statement in writing, or if the other party refuses to accept the sum *so tendered, [*774] or to adopt the proposed alterations in the draft of the conveyance, the master shall then proceed to tax the costs, or settle the conveyance according to the practice of the court. And in case the taxed costs shall not exceed the sum tendered, or the master shall adopt the proposed alterations in the draft of the conveyances, then the costs of the taxation, or the costs of the proceeding with respect to the conveyance, shall be borne by the other party.

LXXXII.

And, whereas the present practice, that causes can only be entered for hearing during the time of term, and that the *subpœna ad audiendum judicium* can only be then returnable, is productive of great delay and inconvenience; it is hereby further ordered, by the said Lord High Chancellor, with the advice and assistance aforesaid, that from henceforth causes may be set down for hearing, and the subpœnas, *ad audiendum judicium*, served and returnable on any day, as well out of term as in term, and this order is to be called the 82d order.[1]

BROUGHAM, C.
JOHN LEACH, M. R.
LANCELOT SHADWELL, V. C.

And it is hereby further ordered, that the aforesaid 82d order shall take effect immediately, and the aforesaid amended orders shall take effect on the first day of Hilary term, next.

BROUGHAM, C.
JOHN LEACH, M. R.
LANCELOT SHADWELL, V. C.

[1] Vide *Turner* v. *Hitchon*, 2 Myl. & Cr. 710. S. C. 1 Keen, 814.

AN

INDEX

TO

THE PRINCIPAL MATTERS.

ACCOUNT.

1 If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify. *Davis* v. *Spurling*, 64

2. A committee of a lunatic should have the previous sanction of the court for not passing his accounts annually. *Anon.* 113

ACCOUNTANT.

An accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 330

ACCOUNTANT-GENERAL.

See APPEAL, 2.

ACCUMULATIVE.

See LEGACY, 2

ADEMPTION.

A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are adeemed, if the testator sell the estate in his lifetime. *Newbold* v. *Roadknight*, 677

See LEGACY, 5.

ADVANCEMENT.

See PORTIONS.

AGENT.

1. If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees Nuttall*, 53

2. An executor, who is employed by his co-executor as an agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate. *Davis* v. *Spurling*, 64

3. In a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 296

See SPECIFIC PERFORMANCE, 2.

AGREEMENT.

1. A court of equity will not entertain a bill for the specific performance of an agreement to pay, in a certain event which has happened, an annual sum by quarterly instalments. *Brough* v. *Oddy*, 55

The written undertaking of one party will be enforced, although the other party is not mutually bound by writing. *Palmer* v. *Scott*, 391

3. If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in the third person, as "Mr. A. B. has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement. *Propert* v. *Parker*, 625

4. Lien established against the produce of West India estates in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and conduct of the parties. *Simon* v. *Hibbert*, 719

See BOND, 1. SPECIFIC PERFORMANCE.

ALIEN.

Under the treaty of 1794 between Great Britain and America, and the act of the 37 G. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain. *Sutton* v. *Sutton*, 663

ALIENATION.

1. A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children: long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 G. 4, c. 119,) in the usual way; and some years afterwards the testator died: Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will *Yarnold* v. *Moorhouse*, 364
2. Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green* v. *Spicer*, 395
3. Where stock was given upon trust for A. for life, and after his decease, for his children, with a proviso, that A.'s life-interest should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge, or affect to charge, affect, or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled: Held, that on A.'s bankruptcy, his life interest passed to his assignees, to the exclusion of his children. *Lear* v. *Leggett*, 690

AMENDMENT.

1. A second order to amend, obtained by petition of course, is irregular, though obtained before answer: (but see *infra*, 2.)
The acceptance of the 20*s.* costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend obtained as of course. *Tarleton* v. *Dyer*; *Barnes* v. *Wilson*, 1
2. The thirteenth of the new orders does not apply to amendments made upon exceptions to the answer being submitted to or allowed: nor does it apply to amendments made before any answer is put in: but in all cases to which it does apply, notice is necessary as well as an affidavit, unless the court upon the particular circumstances dispenses with it. *Bird* v. *Hustler*, 325
See the new order. 769
3. It is irregular to obtain an order to amend, when more than six weeks have elapsed from the time when the answers of all the defendants, who are stated to be within the jurisdiction, are to be deemed sufficient, though no answer has been filed by another person, alleged to be out of the jurisdiction, against whom process is prayed, when he shall come within the jurisdiction. *King of Spain* v. *Hullett*, 7
4. In general, under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on notice. *Freme* v. *Best*, 79
5. Formal amendments will be permitted to be made, without notice, though the bill has been amended previously. *Smith* v. *Evans*, 80
6. A second order, giving the plaintiff leave to amend, made upon an *ex parte* application. *Cottingham* v. *Potts*, 81
7. If a bill, after being filed, is then amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally drawn and signed by counsel. *Burch* v. *Rich*, 156
8. Order made *ex parte* to discharge a defendant in contempt without payment of costs, on certificate that the bill had been amended since the contempt. *Gray* v. *Campbell*; *Smith* v. *Campbell*, 323
9. On the allowance of exceptions to the answer, leave given *ex parte* to the plaintiff to amend his bill, although it had been previously amended. *Mendizabel* v. *Hullett*, 324
10. An order to amend, obtained in violation of the thirteenth of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill. *De Geneve* v. *Hannam*, 494

AMERICA.

See ALIEN.

ANNUITY.

1. Where an annuity is granted for a term of years, to be paid half-yearly, and at the same time, promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase money with interest, exceeding the rate of 5*l.* per cent., the transaction is usurious. *Fereday* v. *Wightwick*, 45
2. Where a testator directs a government annuity of a certain amount to be purchased for his wife within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 606
3. Where an annuity is given to a charitable institution for ever upon a condition, and is once accepted and acted upon, it cannot afterwards be renounced at pleasure; although the gift is coupled with a direction, that, upon the neglect or refusal of the institution at any time to act upon the condition, the annuity

shall be applied in another manner. *Attorney-General* v. *Christ's Hospital*, 626

ANSWER.

1. If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff. *Davis* v. *Spurling*, 64
2. The eighth of the new orders applies only to the case of exceptions; and if the plaintiff afterwards move to amend his bill, the defendant is entitled to an order for time to answer, according to the old practice. *Fosbrooke* v. *Balguy*, 624
3. If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence.

Semble, it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient. *Jeffrey* v. *M'Cabe*, 739

See IMPERTINENCE, 1.

APPEAL.

1. Decree varied on appeal in respect of costs only. *Burkett* v. *Spray*, 113
2. Where an order, directing money to be paid out of court is appealed, the accountant general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below. *Ferguson* v. *Tadman*, 331

See ENROLMENT OF DECREE.

APPORTIONMENT.

See DEVISE, 1.

APPROPRIATION.

See LEGACY, 9.

ARBITRATION.

1. If the assignees of a bankrupt attend meeting under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Dod* v. *Herring; Ex parte Herring*, 153
2. Jurisdiction of the court of chancery in awards, under the 9 & 10 W. 3, c. 15. *In the matter of Joseph and Webster*, 496

ARREST.

A person who is served with a *subpœna ad testificandum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the *subpœna* and the day appointed for his examination.

Semble, A witness, who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bona fide* for the purpose of giving evidence.

A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately. *Gibbs* v. *Phillipson*, 19

ASSETS, ADMINISTRATION OF.

Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute in proportion to their relative amounts, to the payment of the debts and legacies: and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir; and, as far as it is composed of personal estate, to the next of kin. *Roberts* v. *Walker*, 752

See INSOLVENT, 1. DEBTOR AND CREDITOR, 2, 3. MORTGAGE, 1. PARTIES, 3.

ASSIGNMENT.

1. Whether the allowance to the assistant parliamentary counsel to the lords of the treasury be assignable, *Quere*. *Cooper* v. *Reilly*, 560
2. In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund. *Watson* v. *The Duke of Wellington*, 602

AWARD.

See ARBITRATION.

BANKRUPT.

1. If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Dod* v. *Herring; Ex parte Herring*, 153
2. Where stock was given upon trust for A. for life, and after his decease, for his children, with a proviso, that A.'s life interest should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge, or affect to charge, affect or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled: Held, that on A.'s bankruptcy his life interest passed to his assignees, to the exclusion of his children. *Lear* v. *Leggett*, 690

See LIEN, 1.

BARON AND FEME.

Where the husband purchases an estate, but the whole consideration is paid by the sister of the wife, upon condition that the estate be settled to the use of the husband and wife in tail, there the case, though within the letter of the statute of the 11 Hen. 7, c. 20, is not within the equity of the statute: and the alienation

of the wife, after the death of the husband, is valid. *Watkins* v. *Lewis*, 378

BOND.

At the time of executing a bond to secure a sum of money, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest be regularly paid: the letter is a binding undertaking.

Payments of interest made one or even two days after they became due, are no defeasance of the undertaking, if the grantor accepts them without objection. *Norton* v. *Wood*, 178

See LEGACY, 5.

CALICO PRINTING.

See INJUNCTION, 1.

CAVEAT.

See ENROLMENT OF DECREE.

CHARGE.

1. A testator devises lands to R. in fee, and reciting that he has executed a bond for the due payment of a certain annuity, he charges the lands so devised, and also the said R., his heirs, executors, and administrators, with the payment of that annuity; he then gives divers pecuniary legacies, and directs the residue of his personal estate to be divided equally between R. and W.: Held, that the annuity is primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate. *Welby* v. *Rockcliff*, 571
2. Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied. *Wilson* v. *Halliley*, 590

See ADEMPTION, 1. DEVISE, 1.

CHARITY.

1. Where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase money, is an interest in land, within the statute of mortmain, and the purchase money will not pass by his will to a charity. *Harrison* v. *Harrison*, 71
2. If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes, receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will; the trust thus executed is contrary to the mortmain act, and will not be carried into effect by the court. *Attorney General* v. *Ackland*, 243
3. It is the disposition of the court to sustain the *bona fide* acts of the trustees of a charity, where a considerable length of time has intervened. *Attorney General* v. *Pembroke Hall*, 751

See ANNUITY, 3.

CHILDREN.

Wherever the general description of children in a will would include legitimate children, it cannot also be extended to legitimate children.

A testator devised a leasehold in trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Mary, in equal shares: Elizabeth was illegitimate, and William had no other child: Held,

That Elizabeth did not take any share of the residue. *Bagley* v. *Mollard*, 581

CLERK IN COURT.

B., by the directions of a solicitor who was then concerned for a defendant T., had acted as clerk in court for T., and in 1816 filed his answer; after that time T. was generally resident abroad; in 1822 an order was made directing that service of the *subpœna* on his clerk in court should be good service; at the hearing in 1823 no person appeared for T., and a decree *nisi* was pronounced against him; in 1829, the solicitor, upon an application made to him by the plaintiff, declined to receive a notice on the behalf of T., stating that he had long since ceased to be concerned for him, and that he knew not where he was, nor whether he was alive or dead; in 1829 the plaintiff obtained an order that service of the *subpœna* to show cause against the decree on the clerk in court of T. should be good service; and the *subpœna* was served on B., who had not for many years done any act as clerk in court for T.: Held,

That B. was to be considered as still the clerk in court for T., and that the service of the *subpœna* was strictly regular. *Coster* v. *Turnor*, 311

COMMISSION TO ASCERTAIN BOUNDARIES.

1. In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case. *Godfrey* v. *Littel*, 95
2. To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties. *Rayley* v. *Best*, 659

COMMITMENT.

See CONTEMPT, 3.

CONDITION.

Where an annuity is given to a charitable insti-

tution for ever upon a condition, and is once accepted and acted upon, it cannot afterwards be renounced at pleasure; although the gift is coupled with a direction, that, upon the neglect or refusal of the institution at any time to act upon the condition, the annuity shall be applied in another manner. *Attorney-General* v. *Christ's Hospital*, 626

CONFIRMATION.

In order to work confirmation, the party said to confirm must know the law as well as the fact. *Cockerell* v. *Cholmeley*, 418

CONTEMPT.

1. A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause, having a reference to a distinct subject, though precisely between the same party. *Semble*. *Clark* v. *Dew*, 103
2. Order made *ex parte* to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

   Order made *ex parte* to discharge a defendant in contempt without payment of costs, on certificate that the bill had been amended since the contempt. *Gray* v. *Campbell*; *Smith* v. *Campbell*, 323
3. An *ex parte* order of commitment for a contempt is not irregular, because it has been granted absolutely in the first instance although the person guilty of the contempt is not a party in a cause.

   Whether the court will make an *ex parte* order, that a person guilty of a contempt shall stand absolutely committed, upon the testimony of a single witness, *quære?* *Ex parte Clarke*, 563

CONTINGENCY.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age and a bachelor, dying without issue, is not the subject of estimate or calculation.

But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 224

COPYRIGHT.

A plaintiff who complains of a piracy of his work has no remedy in equity, unless he establish a title to an injunction; and then the account will follow.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter, which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years. *Baily* v. *Taylor*, 73

COSTS.

1. *Semble*, if a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bona fide* in expectation of a favourable decree — or if the solicitor of the plaintiff guarantee his client against the costs of the suit — the court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle* v. *Whiting*, 43
2. A trustee, refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 70
3. Where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust property, the court will not give him a mere lien on it, to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them.

   Decree varied on appeal in respect of costs only. *Burkett* v. *Spray*, 113
4. In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer, that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill: *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured:

   But held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard* v. *Draper*, 191
5. Extra costs, occasioned by a mistake of the master, allowed to a creditor proving his debt against a lunatic's estate. *In re Buckle*, 360
6. Where, upon a bill filed by a simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out upon the master's report, that the assets are insufficient to pay the specialty creditors, the executor will have his costs out of the assets, but not the plaintiff. *Young* v. *Everest*, 426
7. Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it was approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant *Watts* v. *Turner*, 634
8. A simple contract creditor, who files a bill for the administration of assets, will not be allowed his costs, if the estate is not sufficient for the payment of specialty debts. *Rowland* v. *Tucker*, 635
9. Assignees of an insolvent mortgagor are not entitled to the costs of a suit for foreclosure, though they by their answer disclaim, and say that if they had been applied to, they would have released the equity of redemption. *Collins* v. *Shirley*, 638
10. A person named a trustee without his knowledge, and in that character made a party to the suit, having never accepted the trusts, is

entitled to his costs as between solicitor and client. *Sherratt* v. *Bentley*, 655

11. Under an award in a cause, which award was afterwards made an order of court, the costs of certain parties were directed to be taxed and paid to them out of the fund: a part of those costs was incurred in proceedings upon a case sent to law; when the bills were carried in for taxation it was discovered that the person who had acted as their solicitor throughout the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the master thereupon disallowed all the items in the bills except disbursements to the clerk in court, and his taxation was confirmed on appeal. *Prebble* v. *Boghurst*, 744
12. After the plaintiffs' costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor; and an order was thereupon made, that the master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded. *Coates* v. *Hawkyard*, 746
13. It appearing, upon a reference to tax an agent's bill of costs in a chancery suit, that he never had been a solicitor of the court, the master was directed to disallow all the items, except those for disbursements made to his clerk in court. *Sumner* v. *Ridgway*, 748
14. If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion. *In the matter of Joseph and Webster*, 496

CREDITOR.

See Costs, 6, 8. Debtor and Creditor. Parties, 3.

COUNSEL.

See Assignment, 1. Receiver, 3.

CROSS EXAMINATION.

See Witness, 3.

CROSS REMAINDERS.

Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over unless there were a failure of issue of all the devisees, there the devisees took cross remainders.

Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively. *Livesey* v. *Harding*, 636

CUSTOMARY TENEMENTS.

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. 32

Sed quære, p. 750.

Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Bingham* v. *Woodgate*, 32

DEBTOR AND CREDITOR.

1. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 45
2. In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the master reported that no debts had been proved, and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account. In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out: Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed; and, therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. *Grey* v. *Somerville*, 338
3. Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute:

Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors.

Whether the master is himself bound to take the objection.—*Quære?* *Shewen* v. *Vanderhorst*, 347

DEVISE.

1. A testator by will gives his moiety of an estate called H., to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired

the other: Although the devise fails as to the after purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 169

2. A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 250
But see *Johnson* v. *Telford*, 244

3. A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper: but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons: Held,
That the sons were only joint tenants for life with a power of sale;
That they could make a good title, and give discharges for the purchase money;
That they were joint tenants for life of the purchase money; and that, upon the death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 413

4. A testator devised in the following words: "as to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charter-house Lane, I give to my wife for her life, and after her decease that in St John's Lane to my daughter; the other between my two sons, to be equally divided:" Held, that the daughter took only an estate for life, in the house in St. John's Lane. *Esdaile* v. *Gall*, 540

5. A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different intent appeared from the subsequent part of the will.
The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage. *Critchett* v. *Taynton*, 541

6. A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.: Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 631

DISCLAIMER.

In order to get rid of the effect of a disclaimer, a direct application, supported by affidavits establishing a special case, is necessary. *Sidden* v. *Lediard*, 110

DISMISSAL OF BILL.

1. If a defendant, who is in a situation to dismiss a bill by an order of course for want of prosecution, after replication filed, does not avail himself of his right, and permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal subsequently obtained, will be discharged for irregularity. *Fernes* v. *Hutchinson*, 22

2. An order to amend, obtained in violation of the 13th of the new orders, may be treated as a mere nullity; although, therefore it remains undischarged, it is no answer to a motion to dismiss the bill.
If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made. *De Geneve* v. *Hannam*, 494

ELECTION.

1. An heir is not put to his election between a Scotch estate and benefits given to him by a will, by the force of mere general expressions: especially if the uses of the will are not applicable to Scotch property.
An heir is not to be disinherited by ambiguous expressions.
A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, and directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, his heir-at-law, or other real representatives, and every other person in whom the same should be vested, should, forthwith upon his decease, convey and assure the same to his trustees upon the trusts of his will: he purchased other estates afterwards: Held, that, as to the subsequently purchased estates, a case of election was not raised against the heir taking benefits under the will. *Johnson* v. *Telford*, 244

2 A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 250

3. Where judgment has been given at law, that a power of sale had not been well executed, the defendants at law, claiming under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument, by which it had been executed, rectified; and they at the same time prosecuted a writ of error on the judgment: the suit in equity having been brought to a hearing, Held, that the plaintiffs in equity were bound to elect either to have the bill dismissed or to abandon the writ of error. *Cockerell* v. *Cholmeley*, 418

ENROLMENT OF DECREE.

A caveat tendered at the proper office, after a decree has been delivered to the secretary for enrolment, and forwarded to the Lord Chancellor in order to be signed, comes too late to prevent the effect of enrolment, although in point of fact the signature was not adhibited till after the caveat was tendered.

The enrolment of a decree will not be vacated merely on the ground of despatch used by the party enrolling, or of surprise upon the opposite party, where no fraud or deception has been practised.

A party is not bound to communicate to his adversary his intention to enrol the decree, because the latter informs him of his intention to appeal against it. *Barnes* v. *Wilson*. *Tarleton* v. *Dyer*, 486

EVIDENCE.

1. If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff. *Davis* v. *Spurling*, 64
2. Where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan: but unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused. *Hodges* v. *Horsfall*, 116
3. Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner. *Pritchard* v. *Draper*, 191

EXCEPTIONS.

Form of exceptions for impertinence under the new orders.

An exception for impertinence fails, if any part of the passage included in it be not impertinent. *Wagstaff* v. *Bryant*, 28

EXCHANGE, RATE OF.

See LEGACY, 5.

EXECUTOR.

An executor who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate. *Davis* v. *Spurling*, 64

See PLEADING, 3, 4.

EXONERATION.

In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect. *Driver* v. *Ferrand*, 681

See CHARGE, 1.

EXTINGUISHMENT.

See POWER, 5, 6, 7.

FELONY.

See FORFEITURE, 2.

FINE.

See POWER, 5, 6.

FORFEITURE.

1. In cases of nonpayment of money, the court will relieve against penalty or forfeiture; but when it is not a case of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, then the privilege is lost, if the money is not paid accordingly. *Davis* v. *Thomas*, 506
2. Personal property, not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown. *Roberts* v. *Walker*, 752

See ALIENATION, 1. BANKRUPT, 2.

FRAUD, STATUTE OF.

See AGREEMENT.

FREEHOLD.

Where a custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Bingham* v. *Woodgate*, 32

GUARDIAN.

Where a father has deserted his children, and is not of ability to maintain them, the court will make an order, referring it to the master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of property to which they are absolutely entitled under a will; and upon the master's report, that it is for their benefit, and with the consent of the executors of that will, will order the sum to be raised accordingly. *In the Matter of the Estate of Mary England, deceased*, 499

HEIR.

See ELECTION.

ILLEGITIMATE CHILDREN.

See CHILDREN.

IMPERTINENCE.

1. Statements in an answer are impertinent, if they are neither called for by the bill nor material to the defence, with reference to the order or decree, which may be made on the bill.

Statements in an answer to a bill of re-

vivor, which merely show irregularity and misconduct in the former proceedings in the suit, are impertinent.

Form of exceptions for impertinence under the new orders.

An exception for impertinence fails, if any part of the passage included in it be not impertinent. *Wagstaff* v. *Bryant*, 28

2. If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impetinence.

Semble, it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient. *Jeffrey* v. *M'Cabe*, 739

IMPLICATION.
See WILL, 32.

INJUNCTION.

1. A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction; and then the account will follow.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter, which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years. *Baily* v. *Taylor*, 73

2. Equitable jurisdiction upon the 34 G. 3, c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property, which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established.

In this case, the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account. *Sheriff* v. *Coates*, 159

3. Injunction granted generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured while the patent was in force. *Crossley* v. *Beverly*, 166

4. A railway company, in exercise of the powers conferred on them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill, if the arch were of the proposed dimensions, but that the injury would be avoided, if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specific dimensions. *Coats* v. *The Clarence Railway Company*, 181

5. An injunction allowed to be moved for *ex-parte*, in a pressing case, after the defendants had entered an appearance.

In this case, counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard. *Acraman* v. *Bristol Dock Company*, 321

6. Where the plaintiff has, by tortious means, got into possession of property pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession. *Grafton* v. *Griffin*, 336

7. The court will stay proceedings in an action against its officers, where the question to be tried is, how far they have conducted themselves with propriety in the execution of its orders. *Ex parte Clarke*, 563

INSOLVENT.

1. A person who had taken the benefit of the act for the relief of insolvent debtors, first in 1814, and a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency: Held,

That the assets ought to be applied in payment first of these subsequent debts; and secondly, of the debts scheduled under the second insolvency; and, thirdly, of the debts scheduled under the first insolvency:

That a court of equity had jurisdiction so to administer the fund: and

That the right of the creditors to such relief was not affected by the statute of limitations. *Barton* v. *Tattersall*, 237

2. A testator bequeathed the dividends of certain stock to his nephew, solely for the manitenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the lords' act (1 G. 4, c. 119,) in the usual way; and some years afterwards the testator died: Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 364

3. Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green* v. *Spicer*, 395

See COSTS, 9. PARTIES, 4.

INSUFFICIENCY.
See ANSWER.

INTEREST.
See LEGACY, 5, 6.

IRISH CURRENCY.

A testator, by his will made in Ireland, prior to the 6 G. 4, c. 79, bequeaths an annuity, and dies domiciled in England, after that act was passed. The annuity is to be paid according to the rate of Irish currency. *Holmes* v. *Holmes*, 660

ISSUE.

Order made *nisi* that an issue might be taken *pro confesso*, the plaintiff in the issue having repeatedly made default. *Powell* v. *Wood*, 354

See COMMISSION TO ASCERTAIN BOUNDARIES, 1.

JAMAICA CURRENCY.
See LEGACY, 5.

JUDGMENT.
See LEGACY, 5.

JURISDICTION.

1. A court of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstance in the manner of execution; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.

Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and in the meantime, to invest it in the public funds; and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser; and the trustee, in consideration of 13,400*l.*, conveyed the land exclusive of the timber. Many years afterwards, the tenant for life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3 per cent. stock as 2448*l.* would have produced at the time of the sale. After the death of A., the next remainder-man, though he had concurred in proceedings in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment on the ground that the power of sale was not well executed: Held,

That a court of equity could not relieve against that judgment. *Cockerell* v. *Cholmeley*, 418

2 Jurisdiction of the court of chancery in awards, under the 9 & 10 W. 3, c. 15. *In the Matter of Joseph and Webster*, 496

See INSOLVENT, 1.

LAPSE.

A testator gave the residue of her estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death, to his two nephews, B. and C., share and share alike; and if either of his nephews died before his share of the trust money became payable, without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue; Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphreys* v. *Howes*, 639

LEASE.

A testator devised lands to trustees, upon trust, out of the rents and profits to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and after the decease of the survivor he devised the lands to their children: Held, that the trustees could grant a valid lease of the lands for a term of ten years. *Naylor* v. *Arnitt*, 501

LEGACY.

1. A testator bequeathed "to the twe sons and the daughter of A. B." 50*l* each: at the date of the will and death of the testator A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50*l.* *Harrison* v. *Harrison*, 72
2. Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional. *Fraser* v. *Byng*, 90
3. A testator gave a legacy of 12,500*l.* 4 per cent. annuities. At the making of his will there was a stock called new 4 per cents., in which he had a small sum, and a stock called 4 per cent. consolidated, of which he was a holder to a very large amount. Before the death of the testator the latter stock was reduced to 3½ per cent.; and another 4 per cent. stock was created. The investment of the legacy is to be in a existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent. *Banks* v. *Sladen*, 216
4. Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it

by deed *inter vivos* during the same period. *Comber* v. *Graham*, 450

5. A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death, the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818 H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment:

Held, That the legacies were demonstrative only, and were not to be considered as having been adeemed:

That as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate, at the time of payment:

That J. C. must be considered as having been paid his legacy by retaining the amount out of the bond debts, and that that amount was to be deducted, first from the interest, and then *pro tanto* from the principal due from him upon the bonds, as at the end of a year after the death of the testator; and interest was then to be calculated on the balance, till the amount equalled the sum for which the judgments were recovered, and no further:

That such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee: and

That the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand, ought to be presumed to have been satisfied *Campbell* v. *Graham*, 453

6. Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age. *Mills* v. *Robarts*, 555

7. A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife. *Garratt* v. *Niblock*, 629

8. A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are adeemed, if the testator sell the estate in his lifetime. *Newbold* v. *Roadknight*, 677

9. Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish.

If in a suit to administer a testator's assets, it clearly appears that a surplus will remain after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the court will by anticipation direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.

Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees. *Thomas* v. *Montgomery*, 729

LIEN.

1. An accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 330

2. A solicitor who receives rents in a cause without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickens* v. *Townshend*, 361

3. Lien established against the produce of West India estates in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and conduct of the parties. *Simond* v. *Hibbert*, 71

See SOLICITOR, 1.

LIFE INTEREST.

1. A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.: Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 631

2. A testator having by his will given an inter-

est for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift: the gift in remainder is not thereby accelerated; but its value is to be computed according to the price of the stock, at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect. *David* v *Rees*, 687

See POWER, 1. SEIGNIORY, 1.

LIMITATIONS, (STATUTE OF).

1. A trust for the payment of debts in a will of personal estate will prevent the operation of the statute of limitations.

Semble, That notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute of limitations.

But *semble*, A debt is not taken out of the statute of limitations by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient. *Jones* v. *Scott*, 253

2. Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute:

Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors.

Whether the master is himself bound to take the objection — *Quære?* *Shewen* v. *Vanderhorst*, 374

See INSOLVENT, 1.

LIS PENDENS.

In a creditor's suit, the debts and costs were paid by the sale of one of two devised estates, and the court directed the master to settle the proportion which was to be borne by the other devised estate; the devisee of the first mentioned devised estate was entitled for life only; and he being an ignorant person and a day laborer, no proceedings were had under this direction for twenty-six years, at the end of which time the other devised estate was sold. The year following the tenant for life died; and his son, who was entitled in remainder, filed a bill to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs; and a decree was made by the master of the rolls accordingly, upon the ground of *lis pendens*, which was held to amount to equitable notice of the charge.

On appeal the decree was reversed by the Lord Chancellor, on the ground that there was no *lis pendens* at the time of the purchase. *Kineman* v. *Kineman*, 617

LUNATIC.

1. A committee of the person and estate of a lunatic appointed without a reference, where the property was small. *Ex parte Farrow, in re Adams*, 112
2. A committee of a lunatic should have the previous sanction of the court for not passing his accounts annually. *Anon.* 113
3. An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference, under the circumstances, on the application of the committee. *In re Fitch*, 354
4. Will of a testator subsequently found a lunatic, directed to be deposited in the custody of the master. *In re Thompson*, 355
5. Order made for a transfer of stock under the 56 G. 3, c. 60, without a reference. *In re Avery*, 356
6. Extra costs occasioned by a mistake of the master allowed to a creditor proving his debt against a lunatic's estate. *In re Buckle*, 368
7. A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to about 1600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces: Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her. *In re Ashley*, 371

MAINTENANCE.

1. Dividends, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor, and the property of small amount. *Payne* v. *Low*, 223
2. Order made upon petition, that part of a small sum of stock bequeathed to an infant, should be sold, and the proceeds applied in paying a debt incurred for necessaries on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance. *Ex parte Swift, In the Matter of Swift*, 575
3. Order made upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education, and advancement, though the shares did not vest till the children came of age. *Ex parte Chambers, In the Matter of Chambers*, 577

See DEVISE, 6. GUARDIAN, 1. LEGACY, 6. LUNATIC, 7.
See also *Hunloke* v. *Gell*, 525, 526.

MISREPRESENTATION.
See SPECIFIC PERFORMANCE, 2, 4.

MORTGAGE.

1. A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor: Held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate. *Greenwood* v. *Taylor*, 185
2. Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt. *Halliwell* v. *Tanner*, 633
3. To a bill for the redemption of a mortgage term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mortgagee's will, are necessary parties, although they are numerous and the property small, and although the trustees have power to give a discharge to the purchaser. *Osbourn* v. *Fallows*, 741

See COSTS, 9. PARTIES, 4.

MORTMAIN.

1. Where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase money, is an interest in land, within the statute of mortmain, and the purchase money will not pass by his will to a charity. *Harrison* v *Harrison*, 71
2. If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will: the trust thus executed is contrary to the mortmain act, and will not be carried into effect by the court. *Attorney General* v. *Ackland*, 243

NEXT OF KIN.
See WILL, 7.

NOTICE.

1. Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate; A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale, as "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation. *Miles* v. *Langley*, 39

2. Purchase for valuable consideration without notice is not available as a defence against a plaintiff who relies upon a legal title.

A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B., who, at the time had no notice of the prior charge: the annuity fell into arrear in 1816; and, in 1817, the rector took the benefit of the insolvent act: B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment till 1827, when A. filed against him a bill for an account; in answer to which, B. insisted that he was a purchaser for valuable consideration without notice: Held,

That that defence was of no avail against the legal title of the plaintiff;

And that the defendant ought to account for the tithes for the six years before the filing of the bill *Collins* v. *Archer*, 284

3. Where the question in the cause turned upon the fact of notice of a settlement, and the names of the witnesses, and the particular facts of notice were not stated in the bill, so that the defendant had no opportunity to meet their testimony, an inquiry as to the fact of notice was directed before the master.

On appeal, the decree was varied by directing an issue to try whether the circumstances, relied upon to prove the notice, took place prior to a stated day, after which notice would be immaterial. *Earle* v. *Pickin*, 547

See LIS PENDENS, 1

ORDERS, NEW. 769

PARENT AND CHILD.
See GUARDIAN, 1.

PARTIES.

1. Where a person, not a party to the suit, is interested in a question, and appears by counsel, and submits to be bound by the decision, the court will not hear him, without the consent of the other parties to the suit. *Boxon* v. *Bolland*, 69
2. A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings, and now submitting to be bound by them. *White* v. *Hall*, 332
3. In a creditor's suit a specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the master's report. *Young* v. *Everest*, 426
4. An insolvent mortgagor, whose assignees dis-

claim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage. *Collins* v. *Shirley*, 638

5. Persons, having prior incumbrances on freeholds and copyholds, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates. *Parker* v. *Fuller*, 656
6. To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties. *Rayley* v. *Best*, 659
7. To a bill for the redemption of a mortgage term all the *cestuis que trust* interested in the produce of the term, as residuary legatees under the mortgagee's will, are necessary parties; although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers. *Osbourn* v. *Fallows*, 741

See PARTNERSHIP, 2. REVIVOR.

PARTNERSHIP.

1. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 45
2. A person employed on behalf of himself and his co-partners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership.

   Before the transaction was discovered, one of the partners withdrew; and subsequently, another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern: Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett* v. *Whitehouse*, 132
3. Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner.

   One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt; and he stated that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the debtor: Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied. *Pritchard* v. *Draper*, 191

See PLEADING, 3, 4.

PATENT.

See INJUNCTION, 3.

PATTERNS.

See INJUNCTION, 2.

PENALTY.

See FORFEITURE, 1.

PERSONAL REPRESENTATIVES.

The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. *Saberton* v. *Skeels*, 587

PIRACY.

The court will, itself, compare and decide upon alleged piracies by inspection, where that can be easily and safely done. *Sheriff* v. *Coates*, 159

See COPYRIGHT. INJUNCTION, 2, 3.

PLEA.

1. To a bill by one who claimed estates, either as heir *ex parte materna* of G., the person last seised or as a remainder man under the limitations of some prior settlement, charging that G. had only a life interest in the property, as would appear if the contents of a certain deed executed in 1730, and within the power of the defendant, were set forth, and praying, besides discovery in aid of an ejectment, the removal of outstanding terms, and other relief connected with the action at law; a plea, that in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee and subsequently devised them to the defendant, but taking no notice of the deed of 1730, and not stating any part of its contents, was overruled. *Hungate* v. *Gascoigne*, 698
2. A plaintiff, claiming as heiress at law of L., who had devised real estates to various persons in tail, reserving the ultimate reversion to his own right heirs, alleged by her bill, that the several estates tail had determined by failure of issue, — that no valid recovery had been suffered, or if it had, that the property had been so settled that she was entitled as right heir of L., — and that so it would appear, if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of such recovery: a plea, which set forth the substance of the deeds making the tenant to the *præcipe*, and leading the uses of the recovery (under which uses the plaintiff had no title), and of the recovery, was held to be a good defence, though not supported by any answer. *Plunkett* v. *Cavendish*, 713

PLEADING.

1. In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evi-

dence, the court will direct a commission or an issue, as will best answer the justice of the case. *Godfrey* v. *Littel*, 59

2. If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify. the corrected error is not a ground for a decree to surcharge and falsify, *Davis* v. *Spurling*, 64

3. Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved. *Bowsher* v. *Watkins*, 277

4. A bill, filed by a creditor of a testator against the executor, and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to detain assets which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator; but it did not charge in express terms that the executor was colluding with his co-partners: the creditor was held to have, under such circumstances, a right to sue all the partners; and a demurrer by the partners, other than the executor, was overruled. *Gedge* v. *Traill*, 281

5. A defendant cannot avail himself of a matter in defence, which appears only upon his evidence, and was not stated in his answer. But if the plaintiff, upon his own case, is not entitled to the relief prayed, the court will not assist him. *Stanley* v. *Robinson*, 527

See AGREEMENT, 1. NOTICE, 2, 3 SUPPLEMENTAL BILL, 1.

PORTIONS.

1. The assumption by a father of a debt due from his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death. *Ansley* v. *Bainbridge*, 677

POWER.

1. A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death, to trustees, upon trust to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*. 188

2. In a partnership deed it was stipulated, that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; and in case of the death of all his children, to his executors or administrators: Held, that the true construction of this is, not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children: Held, that his interest in the partnership passed by this bequest. *Ponton* v. *Dunn*, 402

3. A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper: but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons: Held,

That the sons were only joint tenants for life with a power of sale;

That they could make a good title, and give discharges for the purchase money. *Breedon* v. *Breedon*. 413

4. B., being seised in fee, conveyed the estate to the use of himself for life; remainder to such one or more of his sons as he should appoint: remainder, in default of appointment, to his first and other sons in tail; remainder to himself in fee. On the occasion of the marriage of his eldest son, B. was a party to a deed of settlement, to which the son's intended wife was also a party, and to a fine and recovery levied and suffered in pursuance thereof, whereby the estate was limited to the use of B. for life; remainder to the use of his eldest son, for life; remainder to that son's first and other sons in tail, with divers remainders over: Held, that this settlement was in equity an execution of B.'s power in favor of his eldest son. *West* v. *Berney*. 431

5. A power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land.

It cannot be released where it is to be exercised for the benefit of another.

It may be released, where it is for his own benefit. 434

6. Every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished.

Every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished.

Quere.—Could such a power in gross in a tenant for life be released? 435

Semble, every power reserved by a grantor may be released or extinguished, although he has reserved no other interest in the estate.

Every grantee for life with a power in gross may release or extinguish. 438

6. A fund being limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally, the father released the power as to a portion of the fund, so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest; the court refused to order the transfer of this share to the father. *Cunynghame* v. *Thurlow*. 436 n.

7. *Semble*, where a tenant for life, having a

power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished.

By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of 400 years to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son and one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l* in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament, appoint; and in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises: Held, that the power was extinguished by the fine. *Bickley* v. *Guest*, 440

8. A testator devised lands to trustees upon trust, out of the rents and profits to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and after the decease of the survivor he devised the lands to their children: Held, that the trustees had power to grant a valid lease of the lands for a term of ten years. *Naylor* v. *Arnitt*, 501
9. Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution. *Hunloke* v. *Gell*, 515

See JURISDICTION, 1.

PRACTICE.

1. A second order to amend, obtained by petition of course, is irregular, though obtained before answer. But see *infra* 2.

The acceptance of the 20*s.* costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend obtained as of course. *Tarleton* v. *Dyer*. *Barnes* v. *Wilson*, 1
2. The thirteenth of the new orders does not apply to amendments made upon exceptions to the answer being submitted to or allowed; nor does it apply to amendments made before any answer is put in; but in all cases to which it does apply, notice is necessary as well as an affidavit, unless the court upon the particular circumstances dispenses with it. *Bird* v. *Hustler*, 325

See also the thirteenth new order, as amended, 769
3. It is irregular to obtain an order to amend, when more than six weeks have elapsed from the time when the answer of all the defendants who are stated to be within the jurisdiction, is to be deemed sufficient, though no answer has been filed by another person, alleged to be out of the jurisdiction, against whom process is prayed, when he shall come within the jurisdiction. *King of Spain* v. *Hullett*, 7
4. By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents; after the sister had attained her full age, D. died, having appointed her his executrix; A. gave notice to the persons, who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her; Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them.

The sister filed a bill of revivor after the death of D, and made A. and his infant brother defendants; A. and the brother, after notice of that bill, filed another bill of revivor; this second bill was ordered to be taken off the file; and the court held, that an alleged defect of parties in the frame of the first bill of revivor afforded no reason for allowing the second bill of revivor to remain on the file. *Livesey* v. *Livesey*, 10
5. If a defendant, who is in a situation to dismiss a bill by an order of course for want of prosecution, after replication filed, does not avail himself of his right, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal, subsequently obtained, will be discharged for irregularity. *Fernes* v. *Hutchinson*, 22
6. The sixtieth of the new orders extends to the production of books and papers under orders or decrees made before the date of the new orders.

The master is to exercise the discretion given him by the sixtieth order. to determine what books or papers shall be produced, though the order or decree, under which he is proceeding, requires the parties to produce, on oath, *all* books and papers. *In the Matter of the several Parishes of Llantrisant, &c.* 25
7. Statements in an answer are impertinent, if they are neither called for by the bill nor material to the defence, with reference to the order or decree which may be made on the bill.

Statements in an answer to a bill of revivor, which merely show irregularity and misconduct in the former proceedings in the suit, are impertinent.

Form of exceptions for impertinence under the new orders.

An exception for impertinence fails, if any

part of the passage included in it be not impertinent. *Wagstaff* v. *Bryant*, 28

8. *Semble*, if a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bona fide* in expectation of a favorable decree — or if the solicitor of the plaintiff guarantee his client against the costs of the suit—the court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle* v. *Whiting*, 43

9. If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff. *Davis* v. *Spurling*, 64

10. When a person, not a party to the suit, is interested in a question, and appears by counsel, and submits to be bound by the decision, the court will not hear him, without the consent of the other parties to the suit. *Bozon* v. *Bolland*, 69

11. Under the eighteenth of the new orders, publication may be enlarged on affidavit, without notice. *Brown* v. *Brown*, 77

12. In general under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on notice. *Freme* v. *Best*, 79

13. Formal amendments will be permitted to be made, without notice, though the bill has been amended previously. *Smith* v. *Evans*, 80

But see the eighteenth new order, as amended, 772

14. A second order, giving the plaintiff leave to amend, made upon an *ex parte* application. *Cottingham* v. *Potts*, 81

15. A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause, having reference to a distinct subject, though between precisely the same parties. *Semble*. *Clark* v. *Dew*, 103

16. In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary. *Sidden* v. *Lediard*, 110

17. If a bill, after being filed, is then amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally drawn and signed by counsel. *Burch* v. *Rich*, 156

18. An injunction allowed to be moved for *ex parte*, in a pressing case after the defendants had entered an appearance.

In this case counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard. *Acraman* v. *Bristol Dock Company*, 321

19. Order made *ex parte* to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

Order made *ex parte* to discharge a defendant in contempt without payment of costs, on certificate that the bill had been amended since the contempt. *Gray* v. *Campbell*. *Smith* v. *Campbell*, 323

20. On the allowance of exceptions to the answer, leave given *ex parte* to the plaintiff to amend his bill, although it had been previously amended. *Mendizabal* v. *Hullett*, 324

21. When an order directing money to be paid out of court is appealed, the accountant general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below. *Ferguson* v. *Tadman*, 331

22. When the plaintiff's solicitor merely through ignorance or mistake has neglected to comply with the exigency of the seventeenth order, the court will not relieve the plaintiff upon terms, from the penal consequences of the neglect without the consent of the other party. *Walmsley* v. *Froude*, 334

23. An order was made that the defendant should pay a sum of money by a certain day, or, on default, should stand committed. The plaintiff having been unable to serve that order in time, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk in court good service: The second order was irregular: it ought to have been made on notice. *Leake* v. *Nalder*, 357

24 In a creditor's suit, a specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the master's report. *Young* v. *Everest*, 426

25. A *caveat* tendered at the proper office after a decree has been delivered to the secretary for enrolment, and forwarded to the Lord Chancellor in order to be signed, comes too late to prevent the effect of enrolment, although in point of fact the signature was not adhibited till after the *caveat* was tendered.

The enrolment of a decree will not be vacated merely on the ground of despatch used by the party enrolling, or of surprise upon the opposite party, where no fraud or deception has been practised.

A party is not bound to communicate to his adversary his intention to enrol the decree, because the latter informs him of his intention to appeal against it. *Barnes* v. *Wilson*. *Tarleton* v. *Dyer*, 486

26. An order to amend, obtained in violation of the 13th of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill.

If a notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made. *De Geneve* v. *Hanman*, 494

27. If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an

original motion. *In the matter of Joseph and Webster*, 496

28. An *ex parte* order of commitment for a contempt is not irregular, because it has been granted absolutely in the first instance, although the person guilty of the contempt is not a party in a cause.

Whether the court will make an *ex parte* order, that a person guilty of a contempt shall stand absolutely committed, upon the testimony of a single witness, *quere?* *Ex parte Clarke*, 563

29. If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence.

Semble, it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient. *Jeffrey* v. *M'Cabe*, 739

PRESUMPTION OF PAYMENT.
See LEGACY, 5.

PRIORITY.
See INSOLVENT.

PRO CONFESSO.

Order made *nisi* that an issue might be taken *pro confesso*, the plaintiff in the issue having repeatedly made default. *Powell* v. *Wood*, 354

PRODUCTION OF BOOKS AND PAPERS.
See PRACTICE, 6. WITNESS, 2.

PROTECTION.
See ARREST.

PUBLICATION.
See PRACTICE, 11.

PURCHASER WITHOUT NOTICE.
See NOTICE.

RECEIVER.

1. A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law. *Clarke* v. *Dew*, 103

2. In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, and had got into possession without paying the purchase money, and to which the consignees of the estate were also defendants; an application for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a *subpœna*. *Stratton* v. *Davidson*, 484

3. The court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury, before the hearing. *Cooper* v. *Reilly*, 560

REMOTENESS OF LIMITATIONS.

A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respecive shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age: Held,

That the children of the sisters were not to take a vested interest, till they attained twenty-two: And,

That all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote. *Vawdry* v. *Geddes*, 203
See WILL, 5.

REVERSION.

1. A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age and a bachelor, dying without issue, is not the subject of estimate or calculation.

But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 224

REVIVOR.

1. By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents: after the sister had attained her full age, D. died, having appointed her his executrix: A. gave notice to the persons, who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: the sister filed a bill of revivor and made A. and his infant defendants: A. and his brother, after notice of that bill, filed another bill of revivor: this second bill was ordered to be taken off the file; and the court held, that an alleged defect of parties in the frame of the first bill of revivor afforded no reason for allowing the second bill of revivor to remain on the file *Livesey* v. *Livesey*, 10

REVOCATION.
See WILL, 5.

SATISFACTION.

The assumption by a father of a debt due from

his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death. *Ansley* v. *Bainbridge*, 677

SEIGNORY.
See CUSTOMARY TENEMENT.

SET OFF.
See LEGACY, 5.

SETTLEMENT.

By a marriage settlement stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends to their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons: the wife survived the husband, and at her death there was no child of the marriage living; but a son who died in her lifetime, had attained twenty-one, and married: Held, that the stock vested in that son absolutely. *Torres* v. *Franco*, 649

SOLICITOR.

1. By the direction of A., a bill was filed for the administration of the testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents: after the sister had attained her full age, D. died, having appointed her his executrix: A. gave notice to the persons, who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them. *Livesey* v. *Livesey*, 10
2. *Semble*, if a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bona fide* in expectation of a favorable decree — or if the solicitor of the plaintiff guarantee his client against the costs of the suit — the court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle* v. *Whiting*, 43
3. A solicitor who receives rents in a cause without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickens* v. *Townshend*, 361
4. A solicitor, who purchases from his client, is bound to prove that he paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person.

   After a delay of eighteen years, a bill filed by a client against his solicitor to avoid a purchaser, was dismissed. *Champion* v. *Rigby*, 539
5. Under an award in a cause, which award was afterwards made an order of court, the cost of certain parties were directed to be taxed and paid to them out of the fund: a part of those costs was incurred in proceedings upon a case sent to law; when the bills were carried in for taxation it was discovered that the person who had acted as their solicitor throughout the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the master thereupon disallowed all the items in the bills except disbursements to the clerk in court, and his taxation was confirmed on the appeal. *Prebble* v. *Boghurst*, 744
6. After the plaintiff's costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor; and an order was thereupon made, that the master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view of having them refunded. *Coates* v. *Hawkyard*, 746
7. It appearing upon a reference to tax an agent's bill of costs in a chancery suit, that he never had been a solicitor of the court, the master was directed to disallow all the items, except those for disbursements made to his clerk in court. *Sumner* v. *Ridgway*, 748

SPECIFIC PERFORMANCE.

1. A court of equity will not entertain a bill for the specific performance of an agreement to pay, in a certain event which has happened, an annual sum by quarterly instalments. *Brough* v. *Oddy*, 55
2. It is no defence to a bill for specific performance by the vendor, that, during the treaty, he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise. *Fellowes* v. *Lord Gwyder and Page*, 83
3. Where an agreement expressly refers to a

plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. But unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused. *Hodges* v. *Horsfall*, 116

4. If land, generally reputed to be water meadow, is sold by the description of uncommonly rich water meadow, whereas, in fact, it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale. *Scott* v. *Hanson*. 128

5. The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards: the bill was dismissed on the ground of unreasonable delay. *Watson* v. *Reid*, 236

6. The plaintiff in a bill for the specific performance of a contract, is entitled to a decree, if at the hearing he can show a good title, although he had not such title at the time of the contract: but the defendant, if he had thought fit, might have retired from the contract as soon as the want of title was discovered; and was not bound to wait till the plaintiff could acquire a good title. *Hoggart* v. *Scott*, 293

7. The written undertaking of one party will be enforced, although the other party is not mutually bound by writting. *Palmer* v. *Scott*, 391

8. Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons that he had no right to either rent or land, to agree to accept 10*l.* in full, for rent and land, the court will not entertain a bill for the specific performance of the agreement. *Stanley* v. *Robinson*, 527

STATUTES, CONSTUCTION OF.

If an act of parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common law right. *Ex parte Clayton*, 369

11 Henry 7, c. 20, 377
9 & 10 Will. 3, c. 15, 496
27 Geo. 3, c. 38, 159
34 Geo. 3, c. 23, 159
56 Geo. 3, c. 60, 356

STAY OF PROCEEDINGS.

When an order directing money to be paid out of court is appealed, the accountant general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the court below. *Ferguson* v. *Tadman*. 331

STOCK.
See LEGACY, 3.

SUPPLEMENTAL BILL.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill: *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured. *Pritchard* v. *Draper*, 191

SURVIVOR.
See LAPSE. WILL, 13.

SUSPENSION.

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. *Sed quere*, 32, 750

SUBPŒNA, SERVICE OF.

B., by the directions of a solicitor who was then concerned for a defendant T., had acted as clerk in court for T., and in 1816 filed his answer, after that time T. was generally resident abroad; in 1822 an order was made directing that service of the *subpœna* on his clerk in court should be good service; at the hearing in 1823 no person appeared for T., and a decree *nisi* was pronounced against him; in 1829, the solicitor, upon an application made to him by the plaintiff, declined to receive a notice on behalf of T., stating that he had long since ceased to be concerned for him, and that he knew not where he was, nor whether he was living or dead; in 1829 the plaintiff obtained an order that service of the *subpœna* to show against the decree on the clerk in court of T. should be good service; and the *subpœna* was served on B., who had not for many years done any act as clerk in court for T.; Held,

That B. was to be considered as still the clerk in court of T., and that the service of the subpœna was strictly regular. *Coster* v. *Turnor*, 311

TENANT FOR LIFE.

A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death, to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*, 188

TIME, LENGTH OF.

1. A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds, which the will

specified. At his death, which happened in Scotland in 1790, no such bonds were to be found; but J. C. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which, a year after the testator's death including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J. C. for the full penalties and costs; but no attempt was made to levy execution upon the judgments, and they remained unsatisfied. About the time of the testator's death the legatees came to England, and never returned to Jamaica, nor did any of them set up a claim to their legacies prior to the year 1817. In the year 1818, H. C. and M. C. assigned their respective legacies to the plaintiff, who was the personal representative of J. C., the other legatee; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment:

Held, That the assigned legacies, under the circumstances, and after the lapse of twenty-seven years without demand, ought to be presumed to have been satisfied. *Campbell* v. *Graham*, 453

2. After a delay of eighteen years a bill filed by a client against his solicitor to avoid a purchase, was dismissed. *Champion* v. *Rigby*, 539

TITHES.

1. A rector, in 1811, demised his rectory to A. for a term of years to secure the due payment of an annuity: in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B., who, at the time, had notice of the prior charge; the annuity fell into arrear in 1816; and in 1817, the rector took the benefit of the insolvent act: B. remainder in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment till 1827, when A. filed against him a bill for an account; in answer to which, B. insisted that he was a purchaser for valuable consideration without notice: Held,

That that defence was of no avail against the legal title of the plaintiff:

And that the defendant ought to account for the tithes for the six years before the filing of the bill. *Collins* v. *Archer*, 284

2. Where tithes have never been paid since the dissolution, the court will presume all facts, which, consistently, with the evidence in the cause, would give legal orgin to an exemption from the payment of tithes. *Humphreys* v. *Wagstaff*, 529

TRUST.

Where the trust is too vague for the court to execute, the next of kin are entitled.

A testatrix bequeaths the residue of her property to her executors, upon trust to dispose of the same at such times and for such purposes as they should think fit; it being her intent on that the distribution thereof should be left entirely to their discretion: Held, that the executors were trustees of the residue of the property for the next of kin, of the testatrix. *Fowler* v. *Garlike*, 231

TRUSTEE.

1. If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 53
2. A trustee, refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 70
3. By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. *Cocker* v. *Quayle*, 535
4. Where a trust estate descended to one who refused to execute a conveyance to the *cestuis que trust*, after it was approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant. *Watts* v. *Turner*, 634

10. A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trusts, is entitled to his costs as between solicitor and client. *Sherratt* v. *Bentley*, 655

USURY.

Where an annuity is granted for a term of years to be paid half yearly, and at the same time, promissory notes are given by the grantee for the payment of each half year's annuity when it becomes due, and it appears that the several half yearly payments will repay the purchase money with interest, exceeding the rate of 5*l. per cent.*, the transaction is usurious. *Fereday* v. *Wightwick*, 45

VENDOR AND PURCHASER.

1. Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate; A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale, as, "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he

had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation. *Miles* v. *Langley*, 39

2. Under a decree for sale, made in a suit for the administration of a testator's assets, A. became, in 1813, the purchaser of certain lots; and, after a long resistance to the title, was, in 1824, compelled to pay the purchase money into court, and was let into possession: two years afterwards, and before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, and which there was reason to believe had been long before known to the solicitor of the plaintiff, he obtained a reference back to the master; the master reported against the title; to the report exceptions were taken; and, before the exceptions came on to be heard, the vendors had cured the defect: Held,

That the purchaser had a right to be discharged from his contract, and that a further reference of title ought not to be directed:

That, in a sale under a decree the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 296

3. Under a decree directing the sale of an estate, which, as against T., one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser: afterwards, on the application of A., an order was made by the Vice-Chancellor discharging him from the purchase, on the ground that the decree was not absolute as against T.; the plaintiff immediately gave notice of a motion before the Lord Chancellor to discharge that order; and, that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard: Held,

That the purchaser was entitled to be discharged at the time when the application was made; and that he having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect. *Coster* v. *Turnor*, 311

4. An exception to a report in favor of the title having been on argument allowed, leave was given to the plaintiff, some time afterwards, to go again before the master, for the purpose of bringing evidence to show that the objection which the court had sustained was, in the circumstances, immaterial. *Egerton* v. *Jones*, 694

5. Where the report is in favor of the title, the court, on allowing the exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions and further directions were set down to come on together. *Portman* v. *Mill*, 696

See SOLICITOR, 4.

VESTING.

See DEVISE, 5. REMOTENESS, 1. SETTLEMENT, 1. WILL, 4.

WAIVER.

The acceptance of the 20*s.* costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend obtained as of course. *Tarleton* v. *Dyer*. *Barnes* v. *Wilson*, 1

See BOND. COSTS, 4. DISMISSAL OF BILL, 1. WITNESS, 3.

WILL.

1. A testator bequeathed to the two sons and the daughter of A. B. 50*l.* each: at the date of the will, and the death of the testator, A. B. had one son and four daughters; each of these five children is entitled to a legacy of 5*l.* *Harrison* v. *Harrison*, 72

2. Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter, to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional. *Fraser* v. *Byng*, 90

3. A testator by will gives his moiety of an estate called H. to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate, if he shall possess it at his death, charges it with a sum of money to legatees; at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other; although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 169

4. A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit, of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age: Held,

That the children of the sisters were not to take a vested interest, till they attained twenty-two; And,

That all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote. *Vawdry* v. *Geddes*, 203

5. A testatrix, having a son and two daughters, gave 6000*l.* 3 per cent. stock to her son for life, remainder, as to one moiety of it, to his eldest male child living at her decease; and as to the other moiety, to his other children; she also gave 6000*l.* like stock to her daughters for their respective lives, in equal shares, remainder to their children; and she further gave a sum of bank stock to her three children, in equal shares, during their lives, and the share of each was, at his or her death, to

revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children; Held,

That, by the operation of the codicil, the moiety of 6000*l.* 3 per cent. stock, which, by the will, was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children;

That, as to all the other bequests, the attempt to extend the limitations to great grandchildren was ineffectual; and

That the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 209

6. A testator gave a legacy of 12,500*l.*, 4 per cent. annuities. At the making of his will, there was a stock called new 4 per cents., in which he had a small sum; and a stock called 4 per cent. consolidated, of which he was a holder to a very large amount. Before the death of the testator, the latter stock was reduced to 3½ per cent., and another 4 per cent. stock was created. The investment of the legacy is to be in an existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent. *Banks* v. *Slader*, 216

7. Where the trust is too vague for the court to execute, the next of kin are entitled.

A testatrix bequeaths the residue of her property to her executors, upon trust to dispose of the same at such times and for such purposes as they should think fit; it being her intention that the distribution thereof should be left entirely to their discretion; Held, that the executors were trustees of the residue of the property for the next of kin of the testatrix. *Fowler* v. *Garlike*, 232

8. A testator, by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, and directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, his heir at law, or other real representatives, and every other person in whom the same should be vested, should, forthwith upon his decease, convey and assure the same to his trustees upon the trusts of his will; he purchased other estates afterwards; Held by the master of the rolls, that, as to the subsequently purchased estates, a case of election was not raised against the heir taking benefits under the will. *Johnson* v. *Telford*, 244

But, held, by the Lord Chancellor, that a devise and bequest of "all my estate and effects, both real and personal, which, I shall die possessed of," extends to lands purchased by the testator after the date of his will: and therefore the heir taken benefits under the will must elect. *Churchman* v. *Ireland*, 250

9. A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trust for his children. Long subsequently to the date of the will, and few weeks prior to a codicil confirming it, the nephew took the benefit of the lord's act (1 G. 4, c. 119,) in the usual way; and some years afterwards the testator died: Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 364

10. Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the insolvent act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green* v. *Spicer*, 395

11. A testatrix had power to dispose, by will, of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8750*l.* The testatrix, in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7000*l.* The court decreed, that the 8750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 397

12. In a partnership deed it was stipulated, that the testator's interest in the partnership concern, after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint; and in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; and in case of the death of all his children, to his executors or administrators; Held, that the true construction of this, is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

The testator made a will, not containing any allusion to the power by which he gave all his estate and effects to one of his children; Held, that his interest in the partnership passed by this bequest. *Ponton* v. *Dunn*, 402

13. *Semble*, That, to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Winterton* v. *Crawfurd*, 407

14. A testator devised a farm to his two sons, with permission to dispose of it to certain persons if they thought proper; but if it should not be sold he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons: Held,

That the sons were only joint tenants for life with a power of sale;

That they could make a good title, and give discharges for the purchase money;

That they were joint tenants for life of the purchase money; and that, upon the death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 413

15. Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period. *Comber* v. *Graham*, 450

16. A bequest of a moiety of the interest of the residue of the testator's personal estate, held upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*. 503

17. A testator devised in the following words: "As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Fogwell court, in Charter house Lane, I give to my wife for her life, and after her decease, that in St. John's Lane to my daughter; the other between my two sons, to be equally divided;" Held, that the daughter took only an estate for life, in the house in St. John's Lane. *Esdaile* v. *Gall*, 540

18. A devise of real estate to all the younger children of the testator's daughters, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different interest appeared from the subsequent part of the will.

The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage. *Critchett* v. *Taynton*, 541

19. Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context. *Tilson* v. *Jones; Tilson* v. *Thornton*, 333

20. A testator devises lands to R. in fee, and reciting that he has executed a bond for the due payment of a certain annuity, he charges the lands so devised, and also the said R., his heirs, executors, and administrators, with the payment of that annuity; he then gives divers pecuniary legacies, and directs the residue of his personal estate to be divided equally between R. and W.: Held, that the annuity is primarily a charge upon the lands devised, and upon R. personally, in exoneration of the personal estate. *Welby* v. *Rockcliffe*, 571

21. Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children.

A testator devised a leasehold in trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Mary, in equal shares; Elizabeth was illegitimate, and William had no other child: Held,

That Elizabeth did not take any share of the residue. *Bagley* v. *Mollard*, 581

22. The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. *Saberton* v. *Skeels*, 587

23. Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied. *Wilson* v *Halliley*, 590

24. Where a testator directs a government annuity of a certain amount to be purchased for his wife within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representatives will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 606

25. A testator gives to his wife the residue of his personal property, with a proviso, that if not disposed of by her in her life, or by her will, it should go over. It passed, as part of her property, by her will, although not specifically noticed. *Bourn* v. *Gibbs*, 641

26. Where an annuity is given to a charitable institution for ever upon a condition, and is once accepted and acted upon, it cannot afterwards be renounced at pleasure; although the gift is coupled with a direction, that, upon the neglect or refusal of the institution at any time to act upon the condition, the annuity shall be applied in another manner. *Attorney General* v. *Christ's Hospital*, 626

27. A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after taken wife. *Garratt* v. *Niblock*, 629

28. A testator by will gives his moiety of an estate called H., to his sister and her children, and subsequently by a codicil which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other: Although the devise fails as to the after purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 169

29. Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that pur-

pose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt. *Halliwell* v. *Tanner*, 633

30. Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over unless there were a failure of issue of all the devisees, there the devisees take cross remainders.

Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively. *Livesey* v. *Harding*, 636

31. A testator gave the residue of her estate to trustees, upon trust to pay the dividends to A. during her life; and after her death, to his two nephews B. and C., share and share alike; and if either of his nephews died before his share of the trust money became payable, without leaving issue, the share of him so dying was to go to the survivor: B., one of the nephews, died in the testator's lifetime, and left no issue: Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphrey* v. *Howes*, 639

32. A direction in a will, that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favor of the daughter. *Davis* v. *Davis*, 645

33. A testator, by his will made in Ireland, prior to the 6 G. 4, c. 79, bequeaths an annuity, and dies domiciled in England, after that act was passed. The annuity is to be paid according to the rate of Irish currency. *Holmes* v. *Holmes*, 660

34. In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect. *Driver* v. *Ferrand*, 681

35. A testator having by his will given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity nearly equal to the amount of the dividends of the stock, in the place of the first gift; the gift of the remainder is not thereby accelerated; but its value is to be computed according to the price of the stock, at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect. *David* v. *Rees*, 687

36. Where stock was given upon trust for A. for life, and after his decease, for his children, with a proviso, that A.'s life interest should not be subject to any alienation or disposition by sale, mortgage or otherwise, in any manner whatsoever; and in case he should charge, or affect to charge, affect, or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled: Held, that on A.'s bankruptcy, his life interest passed to his assignees, to the exclusion of his children. *Lear* v. *Leggett*, 690

37. Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies: and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, and, as far as it is composed of personal estate, to the next of kin. *Roberts* v. *Walker*, 752

WITNESS.

1. A person, who is served with a *subpœna ad testificandum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the *subpœna* and the day appointed for his examination.

Semble, A witness who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bona fide* for the purpose of giving evidence.

A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately, *Gibbs* v. *Phillipson*, 19

2. Where a witness is served with a *subpœna* to produce deeds on the execution of a commission, it is not necessary that there should be a written interrogatory as to the fact of his having them in his possession; and if he then takes upon himself to refuse production he does so at the peril of costs in the event of his failing to satisfy the court of his right to withhold them. *Bradshaw* v. *Bradshaw*, 358

3. In equity, an objection to the competency of a witness is not waived by cross examination. *Harrison* v. *Courtauld*, 428

4. Whether the court will, under special circumstances, direct witnesses examined in the cause to be examined to the same points before the master, *quere*. *Earle* v. *Pickin*, 447

END OF THE FIRST VOLUME.

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